



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

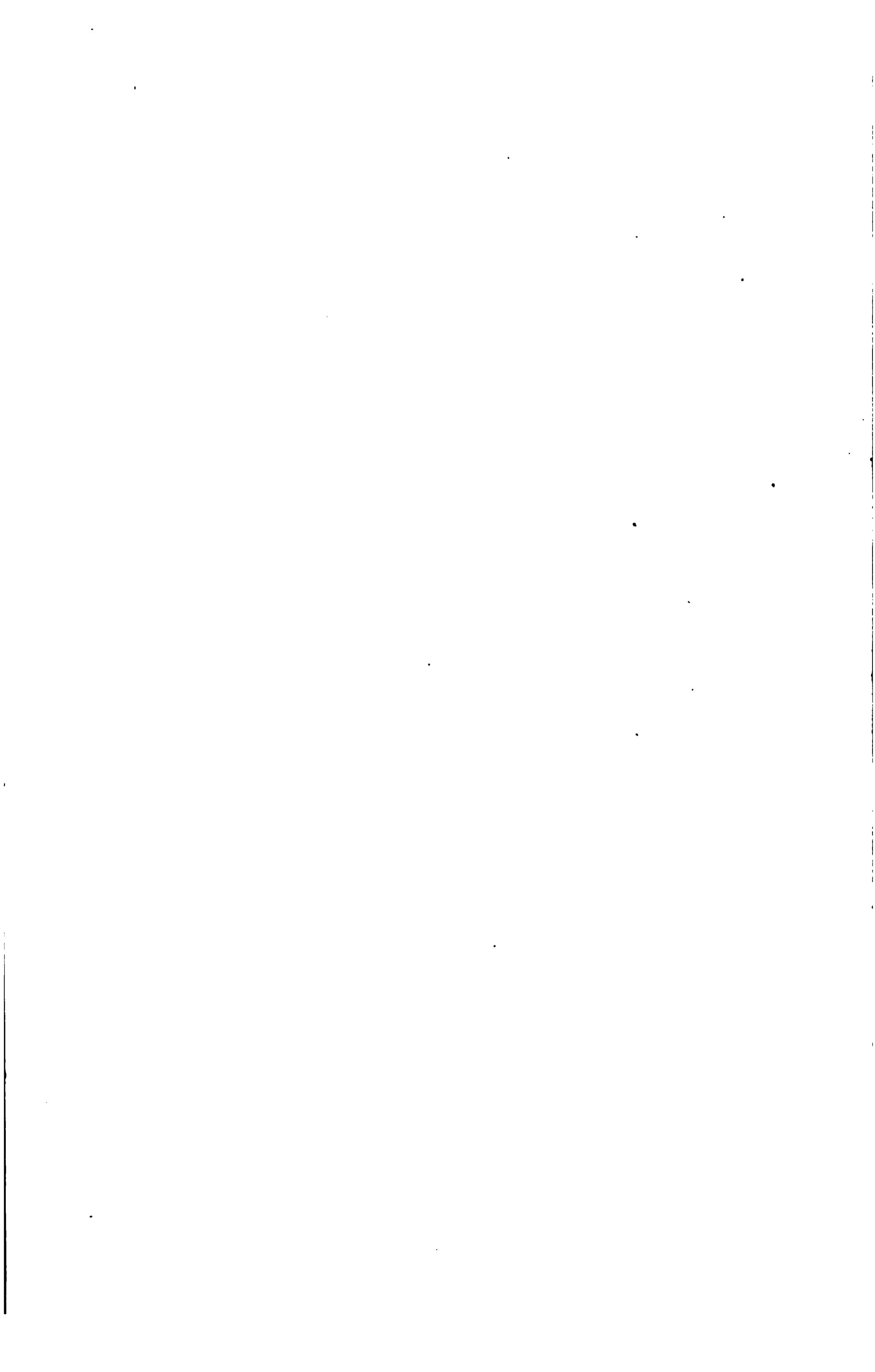
Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

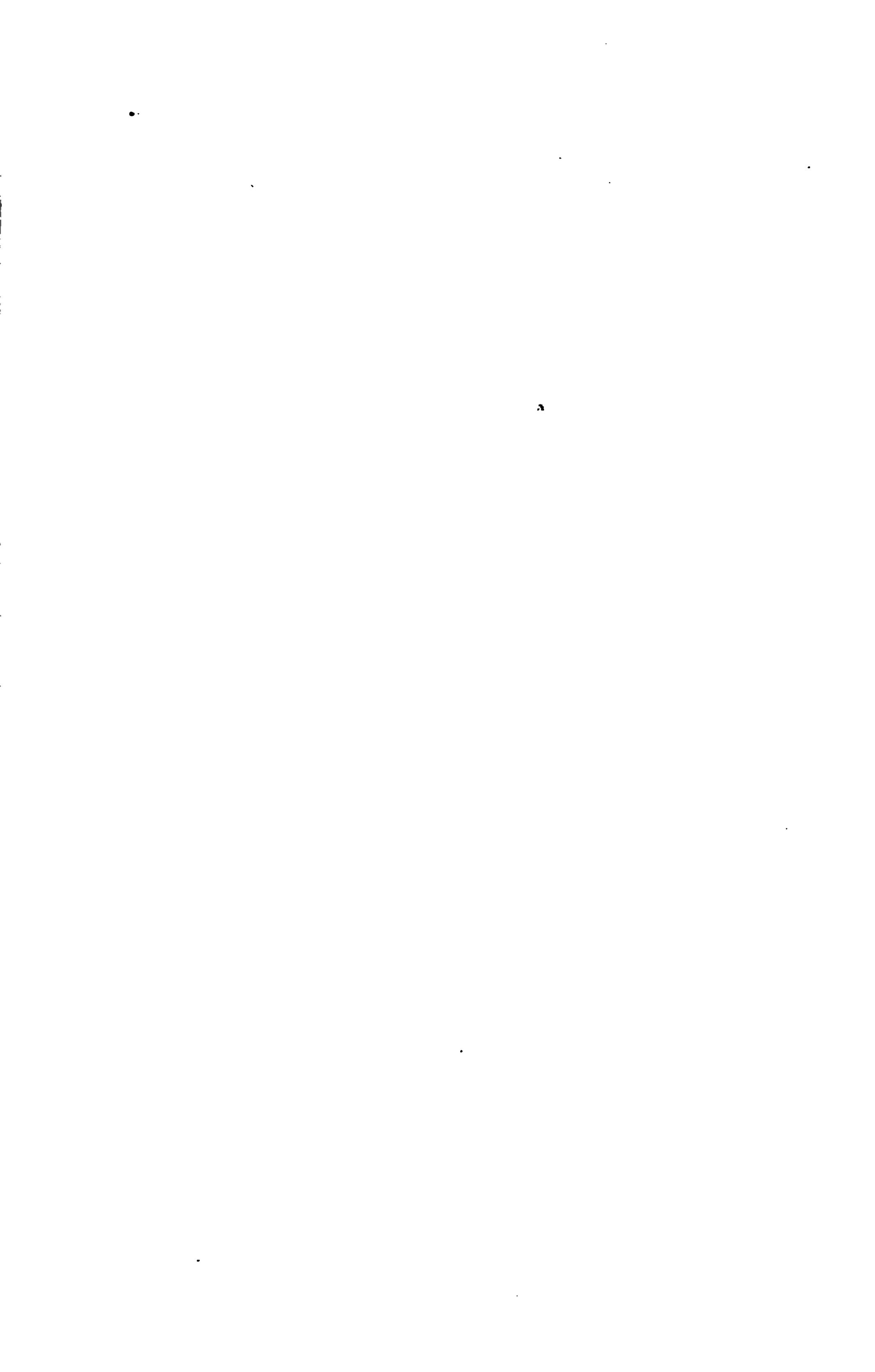
HARVARD LAW LIBRARY

Received FEB 11 1976

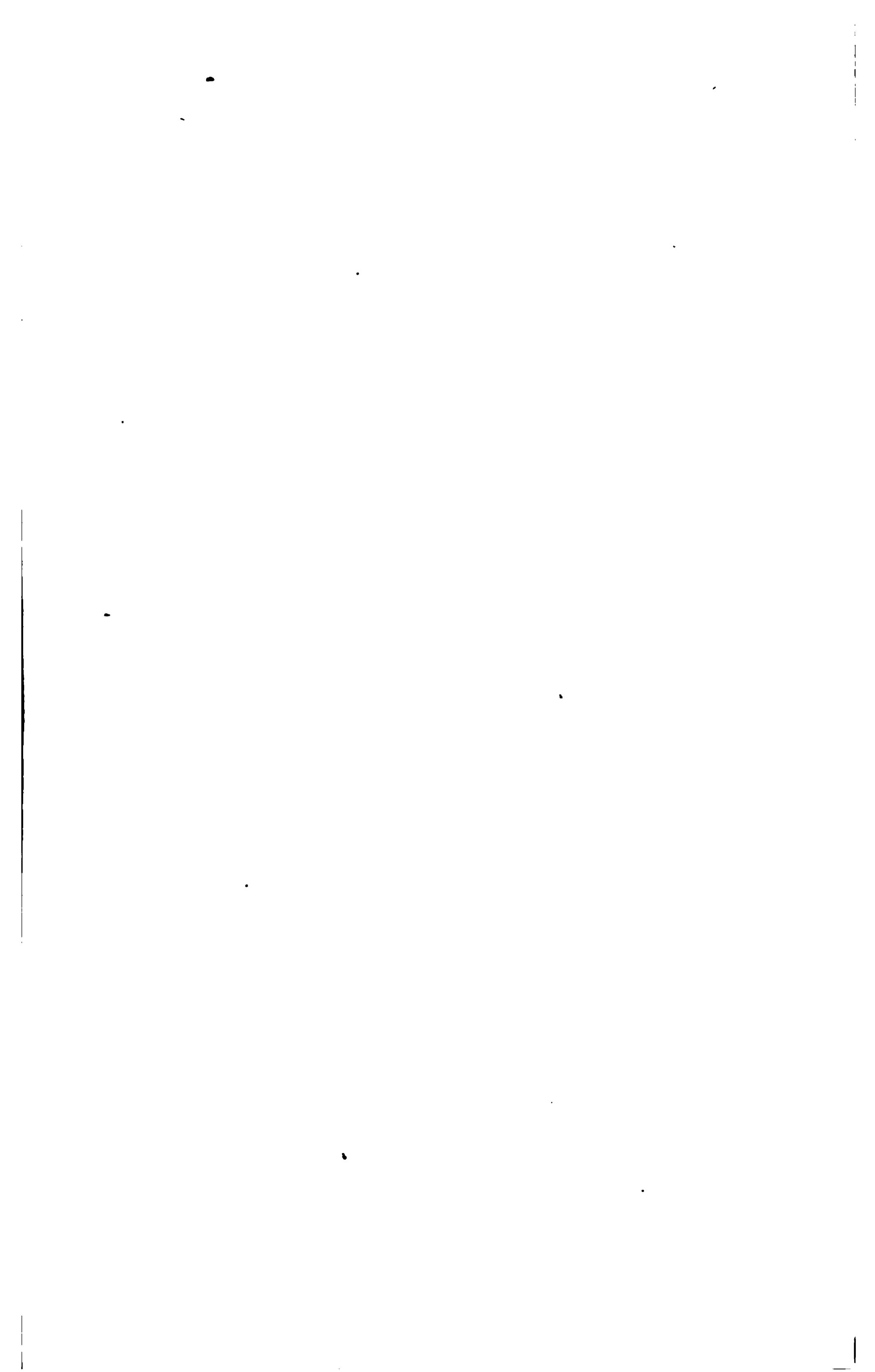
€ 213) 22

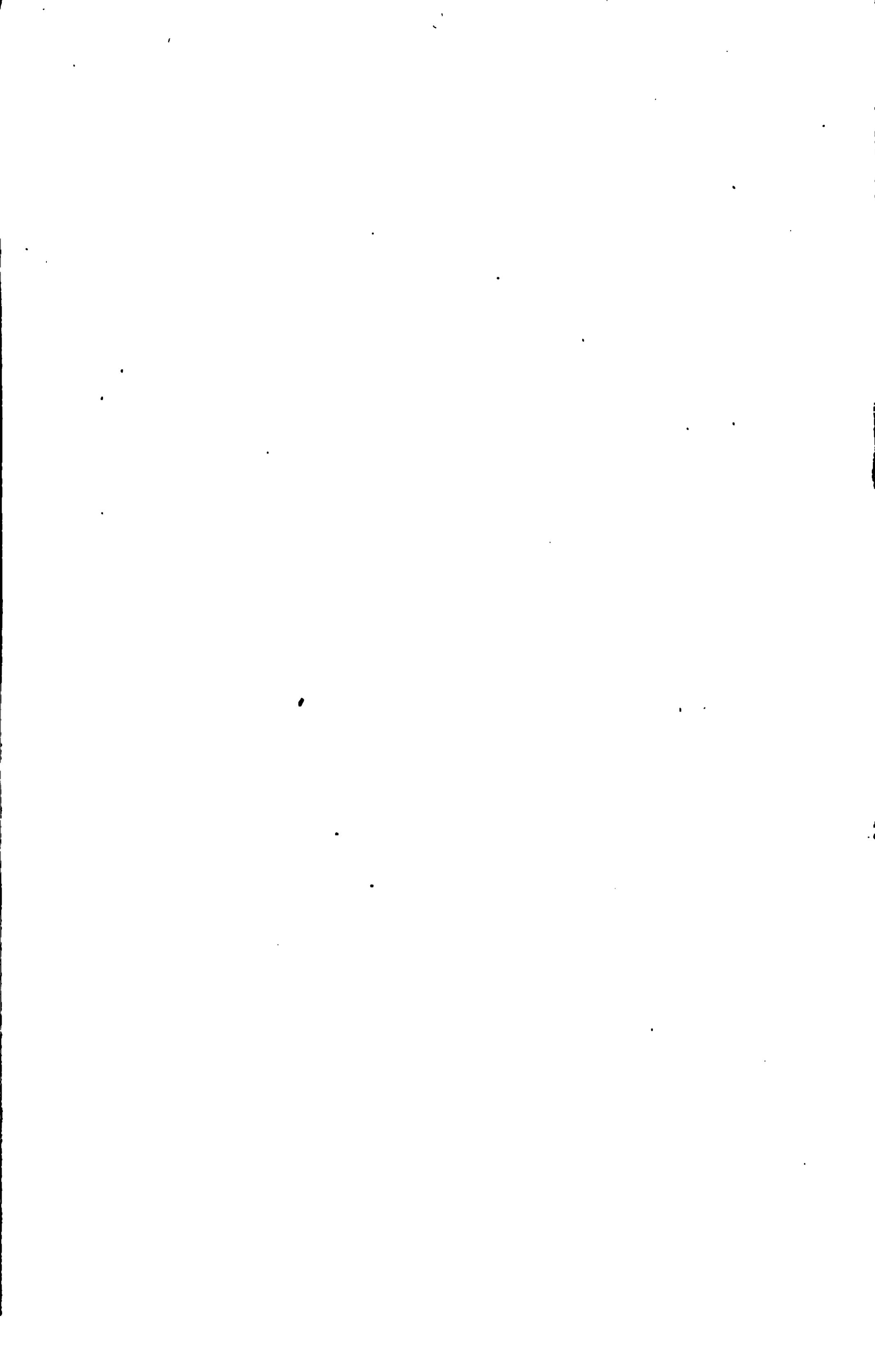
80













	Vol.	1-1st Tenn.		3-71st Tenn.
Overton	"	2-2nd "	Lea	4-72nd "
Overton.....	"	1-3rd "	Lea	5-73rd "
Cook	"	3-4th "	Lea	6-74th "
Haywood	"	4-5th "	Lea	7-75th "
Haywood	"	5-6th "	Lea	8-76th "
Haywood	"	1-7th "	Lea	9-77th "
Peck	"	1-8th "	Lea	10-78th "
Martin & Yerger.....	"	1-9th "	Lea	11-79th ..
Yerger	"	2-10th "	Lea	12-80th ..
Yerger	"	3-11th "	Lea	13-81st ..
Yerger	"	4-12th "	Lea	14-82nd ..
Yerger	"	5-13th "	Lea	15-83rd ..
Yerger	"	6-14th "	Pickle	16-84th ..
Yerger	"	7-15th "	Pickle	1-85th ..
Yerger	"	8-16th "	Pickle	2-86th ..
Yerger	"	9-17th "	Pickle	3-87th ..
Yerger	"	10-18th "	Pickle	4-88th ..
Meigs	"	1-19th "	Pickle	5-89th ..
Humphrey	"	1-20th "	Pickle	6-90th ..
Humphrey	"	2-21th "	Pickle	7-91st ..
Humphrey	"	3-22nd "	Pickle	8-92nd ..
Humphrey	"	4-23rd "	Pickle	9-93rd ..
Humphrey	"	5-24th "	Pickle	10-94th ..
Humphrey	"	6-25th "	Pickle	11-95th ..
Humphrey	"	7-26th "	Pickle	12-96th ..
Humphrey	"	8-27th "	Pickle	13-97th ..
Humphrey	"	9-28th "	Pickle	14-98th ..
Humphrey	"	10-29th "	Pickle	15-99th ..
Humphrey	"	11-30th "	Pickle	16-100th ..
Swan	"	1-31st "	Pickle	17-101st ..
Swan	"	2-32nd "	Pickle	18-102nd ..
Sneed	"	1-33rd "	Pickle	19-103rd ..
Sneed	"	2-34th "	Pickle	20-104th ..
Sneed	"	3-35th "	Pickle	21-105th ..
Sneed	"	4-36th "	Pickle	22-106th ..
Sneed	"	5-37th "	Pickle	23-107th ..
Head	"	1-38th "	Cates	24-108th ..
Head	"	2-39th "	Cates	1-109th ..
Head	"	3-40th "	Cates	2-110th ..
Coldwell	"	1-41st "	Cates	3-111th ..
Coldwell	"	2-42nd "	Cates	4-112th ..
Coldwell	"	3-43rd "	Cates	5-113th ..
Coldwell	"	4-44th "	Cates	6-114th ..
Coldwell	"	5-45th "	Cates	7-115th ..
Coldwell	"	6-46th "	Cates	8-116th ..
Coldwell	"	7-47th "	Cates	9-117th ..
Heiskell	"	1-48th "	Cates	10-118th ..
Heiskell	"	2-49th "	Cates	11-119th ..
Heiskell	"	3-50th "	Cates	12-120th ..
Heiskell	"	4-51st "	Cates	13-121st ..
Heiskell	"	5-52nd "	Cates	14-122nd ..
Heiskell	"	6-53rd "	Cates	15-123rd ..
Heiskell	"	7-54th "	Cates	16-124th ..
Heiskell	"	8-55th "	Cates	17-125th ..
Heiskell	"	9-56th "	Cates	18-126th ..
Heiskell	"	10-57th "	Cates	19-127th ..
Heiskell	"	11-58th "	Thompson.....	1-128th ..
Heiskell	"	12-59th "	Thompson.....	2-129th ..
Baxter	"	1-60th "	Thompson.....	3-130th ..
Baxter	"	2-61st "	Thompson.....	4-131st ..
Baxter	"	3-62nd "	Thompson.....	5-132nd ..
Baxter	"	4-63rd "	Thompson.....	6-133rd ..
Baxter	"	5-64th "	Thompson.....	7-134th ..
Baxter	"	6-65th "	Thompson.....	8-135th ..
Baxter	"	7-66th "	Thompson.....	9-136th ..
Baxter	"	8-67th "	Thompson.....	10-137th ..
Baxter	"	9-68th "	Thompson.....	11-138th ..
Lea	"	1-69th "	Thompson.....	12-139th ..
Lea	"	2-70th "	Thompson.....	13-140th ..
				14-141st ..

*Note: Haywood 1st and 2nd are North Carolina Reports.

REPORTS OF CASES

ARGUED AND DETERMINED

C

IN THE

SUPREME COURT OF TENNESSEE

WESTERN DIVISION,
APRIL TERM, 1919.

EASTERN DIVISION,
SEPTEMBER TERM, 1918.

MIDDLE DIVISION,
DECEMBER TERM, 1918.

FRANK M. THOMPSON,

O ATTORNEY-GENERAL AND REPORTER.

VOL. CXLI.

E. W. STEPHENS PUBLISHING CO.
COLUMBIA, MISSOURI
1919.

**Entered according to act of Congress in the year 1919 by
E. W. STEPHENS PUBLISHING CO.
In the office of the Librarian of Congress at Washington, D. C.**

FEB 7 1920

JUDGES OF THE SUPREME COURT OF TENNESSEE.

State at Large.

GRAFTON GREEN.

Western Division.

F. P. HALL.

C. P. MCKINNEY.

Middle Division

D. L. LANSDEN, Ch. J.

Eastern Division.

N. L. BACHMAN.

Attorney-General and Reporter

FRANK M. THOMPSON,

Chattanooga, Tenn.

COURT OF CIVIL APPEALS OF TENNESSEE.

Eastern Division.

R. H. SANSOM.

Middle Division.

S. F. WILSON, Ch. J.

W. W. FAW.

Western Division.

SID R. CLARK.

W. A. OWEN.

CLERKS OF THE SUPREME COURT OF TENNESSEE.

S. E. CLEAGE	Knoxville
PRESTON VAUGHN	Nashville
I. E. SPRINGBETT	Jackson

CHANCELLORS OF TENNESSEE.

HAL. H. HAYNES—First Division	Bristol
JOHN JENNINGS—Second Division	Jellico
W. B. GARVIN—Third Division	Chattanooga
W. R. OFFICER—Fourth Division	Livingston
W. S. BEARDEN—Fifth Division	Shelbyville
J. W. STOUT—Sixth Division	Clarksville
J. T. LELLYETT—Seventh Division, Part I	Nashville
J. B. NEWMAN—Seventh Division, Part II	Nashville
J. W. ROSS—Eighth Division	Jackson
V. H. HOLMES—Ninth Division	Trenton
F. H. HEISKELL—Tenth Division, Part I	Memphis
I. H. PERES—Tenth Division, Part II	Memphis
H. M. TATE, Eleventh Division	Knoxville
T. L. STEWART—Twelfth Division	Winchester
SAM JOHNSON—Thirteenth Division	Maryville

CIRCUIT JUDGES OF TENNESSEE

D. A. VINES—First Circuit	Johnson City
JAMES L. DRINNON—Second Circuit	Morristown
V. A. HUFFAKER—Third Circuit	Knoxville
SAM C. BROWN—Fourth Circuit	Athens
C. E. SNODGRASS—Fifth Circuit	Crossville
OSCAR YARNELL—Sixth Circuit	Chattanooga
R. W. SMART—Seventh Circuit	McMinnville
J. E. RICHARSON—Eighth Circuit	Murfreesboro
W. L. COOK—Ninth Circuit	Charlotte
A. G. RUTHERFORD—Tenth Circuit	Nashville
A. B. NEIL—Tenth Circuit, 2nd Circuit Court	Nashville
E. F. LANGFORD—Tenth Circuit, 3rd Circuit Court	Nashville
W. B. TURNER—Eleventh Circuit	Columbia
N. R. BARHAM—Twelfth Circuit	Jackson
T. E. HARWOOD—Thirteenth Circuit	Trenton
R. A. ELKINS—Fourteenth Circuit	Dresden
J. P. YOUNG—Fifteenth Circuit	Memphis
B. L. CAPELL—Fifteenth Circuit, 2nd Div.	Memphis
A. B. PITTMAN—Fifteenth Circuit, 3rd Div.	Memphis
H. W. LAUGHLIN—Fifteenth Circuit, 4th Div.	Memphis
R. P. BAPTIST—Sixteenth Circuit	Covington
J. C. HOBBS—Seventeenth Circuit	Centreville
J. T. RAULSTON—Eighteenth Circuit	South Pittsburg

CRIMINAL JUDGES OF TENNESSEE

J. D. B. DeBOW, for Davidson County	Nashville
J. ED RICHARD, for Shelby County, Div. I	Memphis
THOS. W. HARSH, for Shelby County, Div. II	Memphis
T. A. R. NELSON, for Knox County	Knoxville
XENOPHEN HICKS, Criminal Law for 2d Circuit	Clinton
J. M. GARDENHIRE, for Fifth Circuit	Carthage
S. D. McREYNOLDS, for Sixth Circuit	Chattanooga
J. T. CUNNINGHAM, for Montgomery County	Clarksville

ATTORNEYS-GENERAL OF TENNESSEE

O. B. LOVETTE—First Circuit	Greeneville
E. E. CRESSWELL—Second Circuit	Sevierville
R. A. MYNATT—Third Circuit	Knoxville
T. W. PEACE—Fourth Circuit	Madisonville
J. R. MITCHELL—Fifth Circuit	Crossville
G. W. CHAMLEE—Sixth Circuit	Chattanooga
C. D. LAMB—Seventh Circuit	Fayetteville
H. T. STEWART—Eighth Circuit	Woodbury
J. B. BOWMAN—Ninth Circuit	Waverly
G. B. KIRKPATRICK—Tenth Circuit	Nashville
L. B. WHITE—Eleventh Circuit	Lawrenceburg
H. C. ANDERSON—Twelfth Circuit	Jackson
G. C. SHERROD—Thirteenth Circuit	Humboldt
T. O. MORRIS—Fourteenth Circuit	Union City
S. O. BATES—Fifteenth Circuit	Memphis
W. K. ABERNETHY—Sixteenth Circuit	Selmer
JOHN L. NEELY—Seventeenth Circuit	Franklin
B. G. MCKENZIE—Eighteenth Circuit	Dayton
W. H. BUTTRAM—Criminal & Law for Second Circuit	Huntsville
M. G. LYLE, for Montgomery County	Clarksville

ASSISTANTS TO ATTORNEY-GENERAL AND REPORTER OF TENNESSEE

WILLIAM H. SWIGGART, JR.	Union City, Tenn.
CHAS. L. CORNELIUS	Nashville, Tenn.

ASSISTANTS TO ATTORNEYS-GENERAL OF TENNESSEE

CHAS. L. GILBERT—Tenth Circuit	Nashville
W. F. McGAUGHEY—Sixth Circuit	Chattanooga
JOHN EXBY—Fifteenth Circuit	Memphis
W. T. McLAIN—Fifteenth Circuit	Memphis
FRED C. HOUK—Third Circuit	Knoxville

CASES REPORTED.

A

American Trust Co., State by O. S. Hauk Revenue Agent v.	243
Anderson, Chattanooga Warehouse & Cold Storage Co. v.	288
Auto Tire & Vulcanizing Co., Davis v.	527

B

Barnes, State v.	469
Barnwell v. Tate	607
Battistelli v. State	565
Bejach v. Colby	686
Binswanger & Co., Ivy v.	568
Blackwell, Taylor v.	184
Bush, State ex rel. Wilson v.	229
Buford, McGannon v.	631
Buchanan, Montague v.	432
Bransford Realty Co., Dickens v.	387

C

Cambria Coal Co. v. National Surety Co.	270
Carolina Portland Cement Co. v. Hitt Lumber & Box Co.	210
Carroll, Memphis St. Ry. Co. v.	265
Chattanooga Warehouse & Cold Storage Co. v. Anderson	288
Chrisman v. Chrisman	424
Cincinnati, N. O. & T. P. Ry. Co. v. Sharp	146
City of Knoxville v. Lively	22
City of Knoxville v. Yardley	19
City of Memphis v. Enloe	618
City of Memphis v. Hill	250
City of Nashville, State ex rel. v.	405
Colby, Bejach, v.	686
Cole-McIntyre-Norfleet Co. v. Holloway	679
Conrad v. Interstate Life & Accident Insurance Co.	14
Cooley, State v.	33
Costen, State v.	539
Cottrell, Ford v.	169
Crane & Co. v. Hall	556
Crisler, McFadden v.	531
Cummins, State ex rel v.	318

D

Davis v. Auto Tire & Vulcanizing Co.	527
Dickens v. Bransford Realty Co.	387
Dodson v. Polk	695

E

Ewing, Menees v.	399
Enloe, City of Memphis v.	618

F

Farrell, McGannon v.	631
Ford v. Cottrell,	169
Friedman v. State	553

G

Gamble v. Paine	548
Gill v. State	379
Greenlee, Tate v.	103
Griffin, Trammell v.	139

H

Halley, Ogilvie v.	392
Hall, Crane & Co. v.	556
Harmon v. Harmon	64
Hayes, Heggie v.	219
Heggie v. Hayes	219
Henderson Grocery Co. v. Johnson ,.....	127
Herbert & Sons, Stanton v.	440
Hickerson v. State	502
Hickman v. Wright	412
Hill, City of Memphis v.	250
Hitt Lumber & Box Co., Carolina Portland Cement Co. v.	210
Holloway, Cole-McIntyre-Norfleet Co. v.	679
Hunter v. Matt Stewart Co.	507
Hunter v. Swadley,	156
Hutchins v. Wilson	297

I

In re Lumber & Mfg. Co.	325
In re Walker	281
Interurban Transp. Co., Sumner County v.	493
Interstate Life & Accident Insurance Co., Conrad v.	14
Ivy v. Binswanger & Co.	568

J

Jamestown R. Co., Sterns Coal & Lumber Co. v.	203
Johnson, Hudson Grocery Co., v.	127

K

Kenner & Co. v. Peters	55
King, Whaley v.	1
Knox Bros. v. Wagner & Co.	348
Knoxville Railway & Light Co., Sims v.	238

L

Lebanon & Big Spring Turnpike Co. v. State	675
Lively, City of Knoxville, v.	22
Lotspeich v. Mayor and Aldermen of Town of Morristown	113

M

Matt Stewart Co., Hunter v.	507
Mayor and Aldermen of Town of Morristown, Lotspeich v.	113
McFadden v. Crisler	531
McGannon v. Buford	631
McGannon v. Farrell	631
Memphis St. Ry. Co. v. Carroll	265
Menees v. Ewing	399
Mengel Box Co. v. Stevens	373
Metropolitan Casualty Co., Watkins v.	583
Moffatt v. Schenck	305
Montague v. Buchanan	432
Morton v. State	357
Munson v. State	522

N

Nashville Baseball Ass'n, State v.	456
Nashville, C. & St. L. Ry. Co. v. Newsome	8
National Surety Co., Cambria Coal Co. v.	270
New River Lumber Co. v. Tennessee Ry. Co.	281, 325
Newsome, Nashville, C. & St. L. Ry. Co. v.	8

O

Oggvie v. Hailey	392
-------------------------------	------------

P

Paine, Gamble v.	548
Patterson v. Tate	607
Peters, Kenner & Co. v.	55
Polk, Dodson v.	695
Poulder, Southern Ry. Co. v.	197
Ponder v. State	481

R

Roberts v. Southern Ry. Co.	95
Rugg v. The State	362

S

Schenck, Moffatt v.	305
Seaboard Air Line Ry. Co., West Const. Co. v.	342
Sharp, Cincinnati N. O. & T. P. Ry. Co. v.	146
Shepherd's Estate, State ex rel. v.	474
Sims v. Knoxville Railway & Light Co.	238
Southern Ry. Co. v. Pouder	197
Southern Ry. Co., Roberts v.	95
Southern Railway Co. v. State	133
Southern Ry. Co. v. Williams	46
State v. Barnes	469
State, Battistelli v.	565
State Board of Elections, Vertrees v.	645
State v. Cooley	33
State v. Costen	539
State, Friedman v.	553
State, Gill v.	379
State, Hickerson v.	502
State, Lebanon & Big Spring Turnpike Co. v.	675
State, Morton v.	357
State, Munson v.	522
State v. Nashville Baseball Ass'n	456
State, Ponder v.	481
State, Rugg v.	362
State, Southern Railway Co. v.	133
Standard Trust Co., Tennessee Ry. Co. v.	281, 325
Stanton v. Herbert & Sons	440
State ex rel. Wilson v. Bush	229
State ex rel. v. Shepherd's Estate	474
State ex rel v. Cummins	318
State ex rel v. City of Nashville	405
State ex rel. v. American Trust Co.	243
Stevens, Mengel Box Co. v.	373
Sterns Coal & Lumber Co. v. Jamestown R. Co.	203
Summer County v. Interurban Transp. Co.	493
Swadley, Hunter v.	156

T

Tate, Barnwell v.	607
Tate, v. Greenlee	103
Tate, Patterson v.	607
Taylor v. Blackwell	184
Tennessee Ry. Co., New River Lumber Co. v.	281, 325
Tennessee Ry. Co. v. Standard Trust Co.	281, 325
Trammell v. Griffin	139

U

Union Central Life Ins. Co., Yowell v.	70
U. S. Casualty Co., Watkins v.	583

V

Vertrees v. State Board of Elections	645
--	-----

W

Wagner & Co., Knox Bros. v.	348
Watkins v. Metropolitan Casualty Co.	583
Watkins v. U. S. Casualty Co.	583
West Const. Co. v. Seaboard Air Line Ry. Co.	342
Whaley v. King	1
Williams, Southern Ry. Co. v.	46
Wilson, Hutchins v.	297
Wright, Hickman v.	412

Y

Yardley, City of Knoxville, v.	19
Yowell v. Union Central Life Ins. Co.	70

CASES CITED AND APPROVED.

A

Ables v. Ables, 86 Tenn., 333	131
Agee v. Dement, 20 Tenn., 332	329
Agee v. Saunders, 127 Tenn., 683	430
Aikmann v. Sanderson, 122 La., 265	354
Albright v. Territory, 13 N. M., 64	235
Alexander v. Miller, 54 Tenn., 65	181
Ametrano v. Downs, 170 N. Y., 388	180
American Surety Co. of New York v. Pangburn, 182 Ind., 116 ...	276
American Trust Co. v. Balfour, 138 Tenn., 385	180
Anderson v. Condict, 93 Fed., 349	286
Anderson v. State, 27 Tex. App., 177	472
Andrews v. State, 34 Tenn., 551	677
Armstrong v. State, 41 Tenn., 338	677
Atl. Assurance Ass'n. v. Alexander, 104 Ga., 709	16
Attorney General v. City of Detroit, — Mich., 545	670

B

Baily v. Drane, 96 Tenn., 16	477
Baird v. Rogers, 95 Tenn., 492	389
Baltic Min. Co. v. Massachusetts, 231 U. S. 68	377
Baltimore & Potomac R. R. Co. v. Landigan, 191 U. S., 461 ...	268
Baker v. Mitchell, 105 Tenn., 610	329
Baker v. State, 47 Tex. Cr., 482	383
Bank Cases, 92 Tenn., 437	6
Bank v. Divine Gro. Co., 97 Tenn., 603	623
Bank v. Memphis, 101 Tenn., 154	249
Bank v. Memphis, 101 Tenn., 158	263
Barber Asphalt Paving Co. v. Kiene, 99 Mo. App., 528	261
Barnard v. Roan Iron Co., 85 Tenn., 139	638
Barnett v. E. T. V. & G. R. Co. (Ch.), 48 S. W., 817	286
Bedell v. Berkley, 76 Mich., 439	294
Bedford et al. v. Flowers, 30 Tenn., 242	637
Bennett v. Butterfield, 112 Mich., 96	294
Berry v. United Commercial Travelers of America, 172 Iowa, 429 ..	16
Bibel v. People, 67 Ill., 172	123
Bilbro v. State, 26 Tenn., 534	368
Bills v. Goshen, 117 Ind., 221	123
Birket v. Elward, 68 Kan., 295	560
Bissenger v. Guiteman, 53 Tenn., 277	638

Blair v. Waco, 75 Fed., 800	124
Blomsness v. Puget Sound Electric R. Co., 47 Wash., 620	241
Blue Grass Cordage Co. v. Lutby, 98 Ky., 583	684
Board v. Bodkin Bros., 108 Tenn., 700	329
Board of Directors v. Bodkin Bros., 108 Tenn., 700	390
Boatman v. Lasley, 23 Ohio St., 614	448
Bogue v. Bennett, 156 Ind., 478	498
Boro v. Harris, 81 Tenn., 36	193
Boshwitz v. Lawhorn, 131 Tenn., 705	102
Bouldin v. Lockhart, 62 Tenn., 279	324
Brady v. Isler, 77 Tenn., 356	638
Breeden v. Grigg, 67 Tenn., 163	638
Brewer v. McClelland, 144 Ind., 423	670
Brewer v. State, 75 Tenn., 682	165
Briard v. Goodale, 86 Me., 100	69
Brice's Appeal, 95 Pa., 150	513
Bristol, etc., Trust Co. v. Jonesboro Trust Co., 101 Tenn., 545	206
Bristol Trust Co. v. Jonesboro Trust Co., 101 Tenn., 554	580
Brooks v. Fleming, 65 Tenn., 331	67
Brown v. Pforr, 38 Cal., 550	536
Bryant v. Hunt, 36 Tenn., 544	637
Buerton's Case, 6 Co., 1; Turringham's Case, 4 Co., 37	450
Burkholtz v. State, 84 Tenn., 696	322
Burlington, etc. v. Johnson, 38 Kan., 142	498
Brundige v. Railroad, 112 Tenn., 530	17
Burnett v. Maloney, 97 Tenn., 697	323
Byers v. Railroad, 94 Tenn., 345	18

C

Caldwell v. Fulton, 31 Pa., 475	446
Carolina, etc., R. Co. v. Schwalter, 128 Tenn., 363	202
Carpenter v. Frazier, 102 Tenn., 123	165
Carroll v. Alsup, 107 Tenn., 257	249
Carson v. Peterson, 105 Tenn., 541	102
Carter v. Burr, 113 U. S., 737	513
Cartwright v. Dickenson, 88 Tenn., 476	4
Cerny v. Paxton & Gallagher Co., 78 Neb., 134	92
Chambers v. Seay, 73 Ala., 372	536
Chamberlain v. Fox Coal & Coke Co., 92 Tenn., 34	193
Chandler v. Hart, 161 Cal., 405	452
Chattanooga v. Dowling, 101 Tenn., 343	27
Chattanooga v. Raulston, 117 Tenn., 569	256
Chattanooga v. Reed, 103 Tenn., 616	27
Cheney Bros. v. Massachusetts, 246 U. S., 147	376
Chillicothe v. Henry, 136 Mo. App., 468	260
City Lumber Co. v. Temple, 138 Tenn., 91	409
City of Biddeford v. Yates, 104 Me., 508	126

xvi CASES CITED AND APPROVED. [141 Tenn.

City of Cincinnati v. Batsche, 52 Ohio St., 324	260
City of Memphis v. State ex rel., 133 Tenn., 83	396
City of Nashville v. Mason, 137 Tenn., 169	27
City of Springfield v. Green, 120 Ill., 269	261
City of St. Louis v. Juppier, 3 S. W. (Mo.), 401	259
Civil Service Investment Ass'n v. Thomas, 138 Tenn., 77	3
C., N. O. & T. P. Ry. Co. v. Shelton, 123 Tenn., 513	54
Coal & Coke Co. v. Steel Co., 123 Tenn., 428	102
Coal Creek Min., etc., Co. v. Ross, 80 Tenn., 1	196
Cobb v. O'Neal, 34 Tenn., 438	638
Cobb v. Wallace, 45 Tenn., 539	637
Cobb v. Wallace, 45 Tenn., 539	638
Coggeshall v. City of Des Moines, 138 Iowa, 730	674
Comfort v. McLeer, 75 Tenn., 652	286
Commonwealth ex rel. v. Smith, 45 Pa., 59	235
Connelly v. Nashville, 100 Tenn., 262	27
Connolly v. Union Sewer Pipe Co., 184 U. S., 540	624
Connor v. Frierson, 98 Tenn., 183	155
Cooper v. Summers, 33 Tenn., 453	66
Cooper v. Wright, 110 Tenn., 214	428
Cope v. Payne, 111 Tenn., 128	193
Coughlin v. Pinkerton, 41 Wash., 500	354
Cowen v. Kirby, 180 Mass., 505	295
Curran Bill Posting & D. Co. v. Denver, 47 Colo., 221	124
Cussen v. Brandt, 97 Va., 1	512

D

Darnell v. State, 123 Tenn., 663	419
Daugherty v. Nagel, 27 Idaho, 511	235
Davis v. Norvell, 87 Tenn., 36	66
Davis v. Yound, 90 Tenn., 303	225
Day v. Burgess, 139 Tenn., 559	132
DeBerry v. State, 99 Tenn., 207	546
Denver & So. Platte Ry. Co. v. City of Englewood, 62 Colo., 229 ..	629
Detroit v. Detroit Citizens' St. Ry. Co., 184 U. S., 368	629
Dick v. Martin, 26 Tenn., 263	637
Dillard v. Webb, 55 Ala., 468	123
Dodge v. Freedman Savings & Trust Co., 93 U. S., 379	513
Doe v. Wood, 2 Barn. & Ald., 724	445
Dolvin v. American Harrow Co., 125 Ga. 699	93
Douglass v. Baber, 83 Tenn., 651	181
Dunn v. State, 127 Tenn., 267	503
Dush v. Fitzhugh, 70 Tenn., 307	692

E

Earl of Huntington v. Lord Mountjoy, 4 Leo., 147	444
Earthman v. Jones, 10 Tenn., 484	54

Elijah Duncan v. State, 66 Tenn., 394	524
Ellis v. Hamilton, 36 Tenn., 512	637
Erwin v. State, 116 Tenn., 80	410
Evans v. Beaumont, 84 Tenn., 713	181
Exchange Nat. Bank v. Coe, 94 Ark., 387	560
Ex parte Neet, 157 Mo., 527	465

F

Fentress v. Fentress, 54 Tenn., 428	66
Ferguson & Palmer Co. v. Ferguson (Ky.), 114 S. W., 297	295
Ferguson v. Moore, 98 Tenn., 342	225
Ferris v. Fort, 2 Tenn. Ch., 150	329
Fields v. Stunston, 41 Tenn., 40	637
Fisher v. Insurance Co., 124 Tenn., 483	529
Fitzgerald v. Vestal, 36 Tenn., 258	111
Foster v. Water Co., 71 Tenn., 42	27
Fox v. Hudson's Ex'x et al., 150 Ky., 115	18
Frank v. Wright, 140 Tenn., 538	529
Frazier v. Railroad, 88 Tenn., 138	284
Freeport Water Co. v. Freeport City, 180 U. S., 587	630

G

Gaines v. State, 75 Tenn., 410	135
Galbraith v. State, 78 Tenn., 574	614
Gardner v. Hall, 61 N. C., 22	670
Gates v. Card, 93 Tenn., 334	563
German-American Bank v. Wright, 85 Wash., 460	560
Glass v. Howell, 70 Tenn., 50	616
Gibson v. Commonwealth, 106 Ky., 360	472
Gill v. McKinney, 140 Tenn., 559	360
Gloninger v. Franklin Coal Co., 55 Pa., 9	445
Glosson v. Glosson, 104 Tenn., 391	67
Goldman v. Justice, 40 Tenn., 107	67
Goodbar et al. v. City of Memphis et al., 113 Tenn., 38	409
Goodbar v. Memphis, 113 Tenn., 20	624
Goodman v. Wilson, 129 Tenn., 464	530
Goodwin v. Thompson, 83 Tenn., 209	464
Graham v. State, 134 Tenn., 285	467
Grant v. Railroad, 129 Tenn., 398	202
Gray v. Roff, 51 Tenn., 74	437
Green v. Ashe, 130 Tenn., 77	4
Green v. Snyder, 114 Tenn., 100	355
Greenwood v. Bynum, 35 Tenn., 267	216
Greenwood et al. v. Tennessee Mfg. Co., 32 Tenn., 130	214
Grotenkemper v. Carver, 77 Tenn., 280	563

xviii CASES CITED AND APPROVED. [141 Tenn.]

H

Hall v. State, 124 Tenn., 235	20
Halpin v. Campbell, 71 Mo., 493	164
Hamblin v. State, 126 Tenn., 394	524
Hammer v. State ex rel. Richards, 44 N. J. Law, 667	235
Hardison v. Billington, 82 Tenn., 346	563
Hardwick v. Can Co., 138 Tenn., 657	74
Harness v. State, 126 Tenn., 365	524
Harriman v. Yonkers, 181 N. Y., 27	264
Harris v. Columbia Trust Co., 114 Tenn., 328	207
Harrison v. State, 42 Tenn., 234	369
Hartford et al. v. Jackson, 24 Conn., 514	685
Hatch v. U. S. Casualty Co., 197 Mass., 101	602
Hanlon v. Central R. Co. of N. J., 187 N. Y., 73	11
Headrick v. Ruble, 78 Tenn., 15	160
Heiskill v. Lowe, 126 Tenn., 475	419
Hengst v. Cincinnati, 9 Ohio Dec., 731	123
Hicks v. Smith, 72 Tenn., 459	638
Hill v. Ry. Co. (Ch.), 42 S. W., 888	287
Hillman v. Chester, 59 Tenn., 34	193
Hines v. Wilcox, 96 Tenn., 148	643
Hite v. State, 17 Tenn., 203	546
Hobbs v. State, 121 Tenn., 413	505
Home Telegraph Co. v. Los Angeles, 211 U. S., 265	629
Hope v. Wilkinson, 82 Tenn., 21	181
Hormel & Co. v. American Bonding Co., 33 L. R. A. (N. S.), 513.	276
Hubbard v. Wood's Lessee, 33 Tenn., 279	195
Huddleston v. State, 60 Tenn., 110	524
Hughes v. Central Accident Ins. Co., 222 Pa. 462	589
Hunter v. Chandler, 45 Mo., 452	235
Hunter v. Guaranty Co., 129 Tenn., 572-581	276
Hyde v. State, 131 Tenn., 208	555
Hyden v. Hyden, 65 Tenn., 406	563
Hyman v. State, 87 Tenn., 110	409

I

Illinois Central R. Co. v. Kuhn, 107 Tenn., 106	13
Illinois Central Ry. Co. v. Messina, 240 U. S., 395	100
Ingle System Co. v. Norris & Hall, 132 Tenn., 472	167
In re Appointment of Supervisors, 52 Fed., 261	670
In re Morewood Avenue, 159 Pa., 20	259
Insurance Co. v. Mathews, 76 Tenn., 508	637
In re O'Connor, 37 Wis., 379	383
In re 54th Street, 165 Pa., 8	259
Insurance Co. v. Shoemaker, 95 Tenn., 72	563
Irvine v. Chattanooga, 101 Tenn., 291	27

J

Jacksonville, etc. R. Co. v. Adams, 28 Fla., 631	201
Jasper v. Wilson, 14 N. M., 482	537
Jennings Neff & Co. v. Ice Co., 128 Tenn., 231	4
Jewell Belting Co. v. Bertha, 91 Minn., 9	123
Johnson v. Brice, 112 Tenn., 65	499
Johnston v. Macon, 62 Ga., 645	124
Johnstown Iron Co. v. Cambria Iron Co., 32 Pa., 241	446
Jones et al. v. Coal Creek Mining & Mfg. Co., 133 Tenn., 160	315
Jones v. Cullen, 100 Tenn., 24	102
Jones v. N. O., etc., R. Co., 70 Ala., 227	201
Justice v. Nesquehoning Valley R. Co., 87 Pa., 28	201

K

Kansas City, M. & B. R. Co. v. Stiles, 242 U. S., 111	376
Kearly v. Duncan, 38 Tenn., 308	637
Keator v. Scranton Traction Co., 191 Pa., 102	240
Keith v. Funding Board, 127 Tenn., 441	247
Kelly v. State, 123 Tenn., 516	418
Kelly Bros. v. Fletcher, 94 Tenn., 1	4
Kelly Bros. v. Fletcher, 94 Tenn., 6	580
Kendig v. Knight, 60 Iowa, 29	259
King v. Rowan, 57 Tenn., 675	196
King v. Smythe, 140 Tenn., 227	529
Kimreen v. Wells, 144 Mass., 497-503	670
Kirk v. State, 41 Tenn., 344	419
Kiskadden v. Steinle, 203 Fed., 375	5
Knoxville v. Klasing, 111 Tenn., 134	27
Koeppen v. Sedalia, 89 Mo. App., 648	123
Kolb v. Knoxville, 111 Tenn., 311	27
Kuntz v. Davidson County, 74 Tenn., 65	658
Kuntz v. Davidson County, 74 Tenn., 65	670

L

L. A. Becker Co. v. Alvey, 86 S. W., 974	684
L. & N. Railroad Co. v. State, 40 Tenn., 525	135
L. & N. Railroad Co. v. Hagan, 141 Ky., 20	151
L. & N. Railroad Co. v. Childers, 155 Ky., 652	152
Lang v. Vaughn, 137 Ga., 671	180
Langlois v. Cameron, 201 Ill., 301	260
Lauderdale County v. Fargason, 75 Tenn., 153	323
Laufer v. Bridgeport Traction Co., 68 Conn., 457	498
Langlois v. Cameron, 201 Ill., 301	260
Lauter-Lee v. State, 132 Tenn., 655	525
Lawless v. State, 72 Tenn., 178	546
Leyman v. Abiel, 16 Johns., 30	451

xx CASES CITED AND APPROVED. [141 Tenn.]

Lehman v. Coffee, 146 Wis., 218	295
Levy v. Davis, 125 Tenn., 349	132
Lewis v. Atlas Mutual Life Ins. Co., 61 Mo., 534	72
Lewis v. State, 72 Ga., 164	473
Lewis v. Turnley, 97 Tenn., 197	643
Ledbetter v. Turnpike Co., 110 Tenn., 92	499
Lillard v. Porter, 39 Tenn., 177	206
Lindsay v. Allen, 112 Tenn., 637	324
Long v. State, 132 Tenn., 649	506
Louisville, etc., R. Co. v. Nash, 118 Ala., 477	353
Lowry v. Noff, 44 Tenn., 370	359
Lumber Co. v. Lumber Co., 128 Tenn., 11	6
Lyman v. Martin, 2 Utah, 145	670
Lynn v. Polk, 76 Tenn., 121	630
Lytle v. Bass, 47 Tenn., 303	637

M

Macomber v. Nichols, 34 Mich., 212	498
Magill v. Railroad, 2 Tenn. Civ. App., 656	151
Manier v. State, 65 Tenn., 602	524
Manlove v. Gaut, 2 Tenn. Ch. App., 410	177
Manlove v. Gaut, 2 Ch. App., 410	180
Manufacturing Co. v. Vertrees, 72 Tenn., 75	167
Moredock v. Kirby (C. C.), 118 Fed., 180	354
Marr v. Bank of W. Tenn., 44 Tenn., 471	4
Massot v. Moses, 3 S. C., 168	447
May v. Railroad, 129 Tenn., 521	223
Mayor v. Dearmon, 34 Tenn., 119	322
McCarvell v. Sawyer, 173 Mass., 540	295
McCormick v. State, 135 Tenn., 128	564
McCreary v. First National Bank, 109 Tenn., 128	459
McCowell v. Bristol, 89 Va., 652	123
McDonald Auto. Co. v. Bicknell, 129 Tenn., 493	61
McDonnell v. Burns, 28 C. C. A., 174	513
McGinnis v. State, 28 Tenn., 43	677
McIrvin v. Lincoln Memorial University, 138 Tenn., 260	316
McKay v. R. R. Co., 133 Tenn., 590	74
McKay v. Railroad, 133 Tenn., 595	54
McKinley v. State, 27 Tenn., 73	546
McKellop v. De Witz, 42 Okla., 220	537
McKenna v. McKenna, 29 R. I., 224	69
McKinney v. Duncan, 121 Tenn., 265	154
McKinney v. Duncan, 121 Tenn., 269	152
McLean v. State, 55 Tenn., 22	614
McLean v. State, 55 Tenn., 22	637
McLemore v. Railroad, 111 Tenn., 639	207
McNaughton v. McNaughton, 34 N. Y., 201	180

Memphis v. Bing, 94 Tenn., 644	256
Memphis Street Ry. Co. v. State, 110 Tenn., 613	409
Memphis St. Ry. Co. v. Haynes, 112 Tenn., 712	692
Menteer v. Fruit Co., 240 Mo., 177	295
Meredith v. Dibrell, 127 Tenn., 387	516
Merriman v. Magiveny, 59 Tenn., 494	167
Miller v. Childress, 21 Tenn., 319	418
Miller v. White, 76 Am. St. Rep., 805	53
Miner v. Travelers' Ins. Co., 3 Ohio S. & C. P. Dec., 289	16
Mitchell v. Bank, 27 Tenn., 216	637
Moody v. Boston, etc., R. Co., 189 Mass., 277	11
Moore v. Mayor, etc., Chattanooga, 55 Tenn., 379	390
Moore v. Sharp, 98 Tenn., 491	144
Moore v. State, 37 Tenn., 510	323
Morelock v. Bernard, 83 Tenn., 169	196
Morgan Bros. v. Coal & Iron Co., 134 Tenn., 244	580
Morris v. Railroad, 124 Tenn., 524	301
Morrison v. State, 116 Tenn., 534	324
Morrow v. State, 29 Tenn., 120	369
Morse v. Sweenie, 15 Ill. App., 436	498
Motlow v. State, 125 Tenn., 547	396
Mulvey v. State, 43 Ala., 316	359
Mutual Benefit Life Ins. Co. v. Martin County, 104 Minn., 692	245

N

Nance v. Piano Co., 128 Tenn., 1	61
Nashville, etc., R. Co. v. Elliot, 41 Tenn., 611	13
Nashville Life Ins. Co. v. Mathews, 76 Tenn., 499	224
Nashville R. Co. v. Norman, 108 Tenn., 324	692
Nashville Trust Co. v. First National Bank, 123 Tenn., 617	428
National Bank of Newburgh v. Bigler, 83 N. Y., 51	520
Newgass v. St. L., etc., R. Co., 54 Ark., 140	201
Newman v. State, 65 Tenn., 164	524
New York Lubricating Oil Co. v. Pusey, 211 Fed., 625	295
Noel v. Scoby, 49 Tenn., 20	329
Noell v. Power Co., 130 Tenn., 245	625
Norfolk, etc., R. R. Co. v. Consolidated Turnpike Co., 111 Va., 131 .	206
Norwood v. Clem, 143 Ala., 556	237
Northern Indiana R. R. Co. v. Connelly, 10 Ohio St., 159	258

O

Ohio L. Ins. Co. v. Merchants' L. Ins. Co., 30 Tenn., 1	4
Overton v. Lea, 108 Tenn., 505	181

P

Page v. Gillentine, 74 Tenn., 240	563
Palmer v. Express Co., 129 Tenn., 116	419

xxii CASES CITED AND APPROVED. [141 Tenn.

Parker v. Orr, 158 Ill., 609	403
Parker v. Publishing Co., 69 Me., 179	295
Parlow v. Turner, 132 Tenn., 339	131
Pauckner v. Wakem, 231 Ill., 277	295
Pennoyer v. Neff, 95 U. S., 714	354
Penn. R. R. Co. v. Clark Coal Co., 238 U. S., 456	334
Penn. R. R. Co. v. International Coal Co., 230 U. S., 184	329
People ex rel. Healy v. Clean Street Co., 225 Ill., 470	124
People ex rel. Swann v. Loomis, 8 Wend. (N. Y.), 396	235
People v. Beardsley, 150 Mich., 206	472
People v. Gass, 206 N. Y., 609	245
People v. Hartwell, 12 Mich., 508	235
People v. McWethy, 177 Ill., 334	123
People v. Wright, 38 Mich., 744	360
Perkins Oil Co. v. Eberhart, 107 Tenn., 409	74
Perkins Oil Co. v. Eberhart, 107 Tenn., 409	89
Phillips v. Library Co., 55 N. J. Law, 307	295
Philadelphia to Use, etc., v. Fidelity & Deposit of Maryland, 231 Pa., 208	276
Pierce v. Whitcomb, 48 Vt., 129	295
Place v. McIlvain, 38 N. Y., 96	519
Pocahontas Consolidated Collieries v. Commonwealth, 113 Va., 108 ..	245
Porter v. Burton, 57 Tenn., 584	67
Post v. Pearsall, 22 Wend. (N. Y.), 425	448
Preston v. State, 115 Tenn., 343	505
Price v. Allen, 28 Tenn., 703	637
Providence Bank v. Billings, 4 Pet., 514	629

R

Railroad Commission Cases, 116 U. S., 307	629
Railway Co. v. Anderson, 134 Tenn., 687	101
Railroad Co. v. Fleming, 82 Tenn., 128	692
Railroad Co. v. Fort, 3 Tenn. Civ. App., 723	151
Railroad Co. v. Johnson, 67 Tenn., 332	167
Railroad Co. v. Telegraph Co., 101 Tenn., 62	151
Railroad Co. v. Williams, 101 Tenn., 146	263
Railroad v. Byrne, 119 Tenn., 278	623
Railway v. Ellis, 155 U. S., 155	624
Railroad v. Fidelity & Guaranty Co., 125 Tenn., 658-690	276
Railroad v. Gammon, 37 Tenn., 571	637
Railroad v. Hull, 88 Tenn., 33	692
Railroad v. Harris, 99 Tenn., 684	249
Railroad v. Mayor and Alderman of Union City, 137 Tenn., 500 ..	551
Railroad v. Memphis, 126 Tenn., 267	551
Railroad v. Pugh, 97 Tenn., 624	691
Railroad v. Pugh, 97 Tenn., 624	692
Railroad v. Snead, 99 Tenn., 1	165

141 Tenn.] CASES CITED AND APPROVED. xxiii

Railroad v. Walker, 77 Tenn., 481	355
Rail v. Potts et al., 27 Tenn., 225	403
Read v. Mosby, 87 Tenn., 759	111
Redistricting Cases, 111 Tenn., 696	322
Reelfoot Lake Case, 127 Tenn., 575	453
Rex v. Hughes, 3 Jur. N. S., 996	473
Riley v. Buchanan, 116 Ky., 625	498
Rison v. Wilkerson, 35 Tenn., 569	428
Roberts v. City of Evanston, 218 Ill., 296	260
Rollins v. Chicago, M. & St. P. Ry. Co., 139 Fed., 639	268
Rowlett v. Rowlett, 116 Tenn., 467	428
Ryan v. Town of Sumner, 17 Wash., 228	259
Ryerson v. Bathgate, 67 N. J. Law, 337	295

S

Samuelson v. State, 116 Tenn., 475	419
Saunders v. Hackney, 78 Tenn., 203	196
Sawyer v. Hoag, 17 Wall., 610	5
Scanlon v. Walshe, 81 Md., 118	206
Schmidt v. Bauer, 80 Cal., 568	295
Scoville v. Thayer, 105 U. S., 143	6
Scovill v. City of Cleveland, 1 Ohio St., 126	258
Shacklett v. Polk, 51 Tenn., 105	359
Sharp v. Mynatt, 69 Tenn., 375	154
Shaw v. Goldman, 116 Mo. App., 332	295
Shaw v. Webb, 131 Tenn., 173	61
Sherman v. State, 125 Tenn., 19	505
Shields v. Clifton Hill Land Co., 94 Tenn., 123	4
Shields v. Clifton Hill Land Co., 94 Tenn., 123	165
Shurtleff v. Chicago, 190 Ill., 296	260
Smaller v. Garrett, 127 Tenn., 665	65
Smith v. Printing Co., 97 Tenn., 351	286
Solincky v. Lincoln Savings Bank, 85 Tenn., 365	163
Southern Ice & Coal Co. v. Alley, 127 Tenn., 173	61
Southern Ry. Co. v. Jennings, 130 Tenn., 450	199
Southern Ry. Co. v. Linear, 138 Tenn., 543	100
Southern Railway Co. v. Tift, 206 U. S., 428	330
Stamper v. Venable, 117 Tenn., 557	206
Standard Oil Co. v. State, 117 Tenn., 618	530
Stanford Oil Mill Co. v. Barnes, 103 Tex., 409	295
Stamper v. Venable, 117 Tenn., 557	74
State v. Alabama Fuel & Iron Co., 188 Ala., 487	245
State v. Algood, 87 Tenn., 163	623
State v. Alston, 94 Tenn., 674	248
State v. Bradt, 103 Tenn., 584	410
State v. Burnett, 53 Tenn., 188	322

xxiv CASES CITED AND APPROVED. [141 Tenn.]

State v. Butler, 83 Tenn., 104	167
State v. Cleaves, 59 Me., 298	359
State v. Cleaves, 59 Me., 298	359
State v. Davidson, 42 Tenn., 184	546
State v. Erwin, 139 Tenn., 341	485
State v. Fleming, 26 Tenn., 152	544
State v. Gilliam, 66 S. C., 419	473
State v. Glavin, 67 Conn., 29	124
State v. Hughes, 31 Tenn., 261	546
State v. Kelly, 76 Me., 331	383
State v. Ladd, 32 Tenn., 226	369
State v. Leonard, 86 Tenn., 487	323
State v. Maloney, 92 Tenn., 68	323
State v. Manson, 105 Tenn., 232	419
State v. Mack, 23 Nev., 359	383
State v. McKay, 137 Tenn., 280	396
State v. Missio, 105 Tenn., 219	524
State v. Nine Justices, 90 Tenn., 726	323
State v. Pennington, 40 Tenn., 119	368
State v. Polk, 82 Tenn., 6	614
State v. Prather, 79 Kan., 513	459
State v. Railroad, 91 Tenn., 445	135
State v. Railroad, 124 Tenn., 1	624
State v. Sexton, 121 Tenn., 35	677
State v. Alston, 94 Tenn., 674	397
State v. Smith, 65 Me., 257	473
State v. Stroud (Ch. App.), 52 S. W., 697	498
State v. Tully, 31 Mont., 365	383
State v. Weaver, 122 Tenn., 198	144
State v. Wheeler, 127 Tenn., 58	419
State v. Willis, 40 Tenn., 157	546
State and County of Tenn. v. Lewis, 78 Tenn., 168	234
State ex rel. v. American Trust Co., 208 S. W., 611	397
State ex rel. Board, etc., of Benton County v. Boice, 140 Ind., 506..	418
State ex rel. Crump, 134 Tenn., 121	231
State ex rel. v. Garrett, 135 Tenn., 617	566
State ex rel. v. Howse, 132 Tenn., 452	231
State ex rel. v. Howard, 139 Tenn., 73	237
State ex rel. v. L. & N. R. R. Co., 139 Tenn., 406	397
State ex rel. v. Trewhitt, 113 Tenn., 571	324
State ex rel. v. Vanderbilt University, 129 Tenn., 279	90
Steele v. Frierson, 85 Tenn., 430	111
Sternbergh v. Brock, 225 Pa., 279	91
Stevens v. Green County Iron Co., 58 Tenn., 71	614
Stevens v. Wells, 36 Tenn., 387	215-16
Stewart et al. v. Insurance Co., 77 Tenn., 104	637
Stewart v. Insurance Co., 77 Tenn., 104	637

St. Johnsville v. Smith, 184 N. Y., 341	200
St. L., etc., R. Co. v. Nyce, 61 Kan., 394	201
St. Louis, I. M. & S. Ry. Co. v. Green, 85 Ark., 117	11
St. Louis & S. F. R. Co. v. Cundieff, 171 Fed., 319	268
St. Louis Southwestern R. Co. v. Arkansas, 235 U. S., 350	377
Stockley v. Cissna, 119 Fed., 812	463
Stowell v. Greenwich Ins. Co., 20 App. Div. 188	72
Stratton v. Morris, 89 Tenn., 534	624
Street Railroad v. Boddy, 105 Tenn., 666	240
Street Railway Co. v. Giardino, 116 Tenn., 338, 368	18
Studebaker v. Markley, 7 Ind. App., 368	69
Sutton v. State, 96 Tenn., 696	322
Swipe v. Leffingwell, 72 Mo., 348	513

T

Tabor v. Hipp et al., 136 Ga., 123	237
Tate et al. v. Greenlee, 141 Tenn., —	480
Tennessee Automatic Lighting Co. v. Massey (Ch. App.), 56 S. W., 35	167
Territory v. Manton, 8 Mont., 95	472
Texas & Pacific R. R. Co. v. Abilene Cotton Oil Co., 204 U. S., 426 ..	332
Texas & Pacific Ry. Co. v. Mary Gentry, 163 U. S., 353	268
Tierney v. Tierney, 81 Neb., 193	69
Tinicum Fishing Co. v. Carter, 61 Pa., 21	448
Thomas v. State, 109 Tenn., 688	505
Thomas v. State, 136 Tenn., 47	488
Toledo, etc., R. Co. v. Dunlap, 47 Mich., 465	201
Tomlinson v. Chicago, M. & St. P. Ry. Co., 139 Fed., 630	268
Toppins v. Railroad, 73 Tenn., 600	355
Topliff v. Topliff, 122 U. S., 121	90
Tradesmen Pub. Co. v. Knoxville Car Wheel Co., 95 Tenn., 634 ..	286
Travelers' Ins. Co. v. Murray, 16 Colo., 296	16
Travis v. Sitz, 135 Tenn., 157	436
Trogden v. Williams, 144 N. C., 192	537
Trout v. N. & W. Railway Co., 107 Va., 576	639
Trust Co. v. Bank, 91 Tenn., 336	6
Trust Co. v. McDougald, 132 Tenn., 323	561
Turnpike Co. v. Marshall, 61 Tenn., 118	499

U

Union Trust Co. v. Detroit, 170 Mich., 692	245
United States v. A Certain Tract of Land, 47 Cal., 515	200
United States v. Great Falls Mfg. Co., 112 U. S., 645	454
United States v. Lynah, 188 U. S., 445	454
U. S. Fidelity & Guaranty Co. v. Haggart, 163 Fed., 809	276
Upton v. Phillips, 58 Tenn., 224	614

xxvi CASES CITED AND APPROVED. [141 Tenn.]

V

Vance v. McNabb Coal & Coke Co., 92 Tenn., 47	4
Van Leer v. Fain, 25 Tenn., 104	637-38
Vicksburg v. Vicksburg Waterworks Co., 206 U. S., 496	629
Voorhees v. Bank, 10 Pet., 449	52

W

Wabash Railroad Co. v. Rosa De Tar, 141 Fed., 932	268
Walker v. Quincy, etc., R. Co., 178 S. W., 108	12
Waterbury v. Russell, 67 Tenn., 163	638
Weatherhead v. Ettinger, 78 Ohio St., 104	537
Weaver v. Boggs, 38 Md., 255	353
Weisinger v. Bank, 78 Tenn., 330	637
Wells v. National Life Association, 39 C. C. A., 476	72
Westchester Life Ins. Co. v. McAdoo, 57 S. W., 409	605
Western Tie & Timber Co. v. Brown, 196 U. S., 502	5
Western Union Tel. Co. v. Lamb, 140 Tenn., 111	529
Westrup v. Commonwealth, 123 Ky., 95	472
Wheeler v. Weightman, 96 Kan., 50	245
White v. Buchanan, 46 Tenn., 32	329
Whiteside v. State, 44 Tenn., 182	370
Whyte v. Mayor & Aldermen of Nashville, 32 Tenn., 364	124
Wilbur v. Springfield, 123 Ill., 395	261
Wild v. Deig, 43 Ind., 455	498
Wilkinson v. Williams, 79 Tenn., 355	163
Williams v. Carson et al., 68 Tenn., 516	428
Williams v. Storm, 46 Tenn., 207	683
Wilson v. M. E. Zion Church, 138 Tenn., 398	160
Wilt v. State, 45 Tenn., 11	677
Woodard v. Brien, 82 Tenn., 520	322
Wright v. Cunningham, 115 Tenn., 454	409

Z

Zickler v. Union Bank & Trust Co., 104 Tenn., 277	478
Zoebish v. Tarbell, 10 Allen (Mass.), 385	295

CASES CITED AND DISTINGUISHED.

A

Adams v. Gillig, 199 N. Y., 314	638
American Trust Co. v. Balfour, 138 Tenn., 385	177
Anderson v. Railroad, 91 Tenn., 44	165

B

Bank of Tennessee v. Dibrell, 35 Tenn., 379	389
Baumister v. Casualty Co., 124 Mo. App., 38	592
Bennett v. L. & N. Railroad Co., 102 U. S. 577	293
Boles v. Smith, 37 Tenn., 106	192
Brown v. Brown, 34 Tenn., 432	53
Burns v. City of Nashville, 132 Tenn., 434	303

C

Chattanooga Station Co. v. Harper, 138 Tenn., 502	692
Cheatham v. Williams, 4 East., 469	444
Chicago v. Sheldon, 9 Wall., 50	90
City of Memphis v. Laski, 56 Tenn., 511	389
Clapp v. La Grill, 103 Tenn., 170	155
Collier v. Railroad, 113 Tenn., 96	165
Collingswood Sewerage Co. v. Borough of Collingswood, 105 Atl., 209	627
Cooper v. Reynolds, 77 U. S. (U. S.), 308	51
Croker v. Sturgis, 175 N. Y., 158	233

D

Duke of Sutherland v. Heathcote, 1 Ch., 475	445
---	-----

E

Ex parte Roquemore, 60 Tex. Cr., 282	463
Express Co. v. Patterson, 122 Tenn., 293	262

F

Fleming v. Memphis, 126 Tenn., 337	673
Flexner v. Farson et al., 268 Ill., 435	356

G

Glaser v. Rothschild, 221 Mo., 186	295
Grant v. North American Casualty Co., 88 Minn., 397	590
Greenwood v. Tennessee Mfg. Co., 32 Tenn., 130	214

xx CASES CITED AND APPROVED. [141 Tenn.]

Lehman v. Coffee, 146 Wis., 218	295
Levy v. Davis, 125 Tenn., 349	132
Lewis v. Atlas Mutual Life Ins. Co., 61 Mo., 534	72
Lewis v. State, 72 Ga., 164	473
Lewis v. Turnley, 97 Tenn., 197	643
Ledbetter v. Turnpike Co., 110 Tenn., 92	499
Lillard v. Porter, 39 Tenn., 177	206
Lindsay v. Allen, 112 Tenn., 637	324
Long v. State, 132 Tenn., 649	506
Louisville, etc., R. Co. v. Nash, 118 Ala., 477	353
Lowry v. Noff, 44 Tenn., 370	359
Lumber Co. v. Lumber Co., 128 Tenn., 11	6
Lyman v. Martin, 2 Utah, 145	670
Lynn v. Polk, 76 Tenn., 121	630
Lytle v. Bass, 47 Tenn., 303	637

M

Macomber v. Nichols, 34 Mich., 212	498
Magill v. Railroad, 2 Tenn. Civ. App., 656	151
Manier v. State, 65 Tenn., 602	524
Manlove v. Gaut, 2 Tenn. Ch. App., 410	177
Manlove v. Gaut, 2 Ch. App., 410	180
Manufacturing Co. v. Vertrees, 72 Tenn., 75	167
Moredock v. Kirby (C. C.), 118 Fed., 180	354
Marr v. Bank of W. Tenn., 44 Tenn., 471	4
Massot v. Moses, 3 S. C., 168	447
May v. Railroad, 129 Tenn., 521	223
Mayor v. Dearmon, 34 Tenn., 119	322
McCarvell v. Sawyer, 173 Mass., 540	295
McCormick v. State, 135 Tenn., 128	564
McCreary v. First National Bank, 109 Tenn., 128	459
McCowell v. Bristol, 89 Va., 652	123
McDonald Auto. Co. v. Bicknell, 129 Tenn., 493	61
McDonnell v. Burns, 28 C. C. A., 174	513
McGinnis v. State, 28 Tenn., 43	677
McIrvin v. Lincoln Memorial University, 138 Tenn., 260	316
McKay v. R. R. Co., 133 Tenn., 590	74
McKay v. Railroad, 133 Tenn., 595	54
McKinley v. State, 27 Tenn., 73	546
McKellop v. De Witz, 42 Okla., 220	537
McKenna v. McKenna, 29 R. I., 224	69
McKinney v. Duncan, 121 Tenn., 265	154
McKinney v. Duncan, 121 Tenn., 269	152
McLean v. State, 55 Tenn., 22	614
McLean v. State, 55 Tenn., 22	637
McLemore v. Railroad, 111 Tenn., 639	207
McNaughton v. McNaughton, 34 N. Y., 201	180

Memphis v. Bing, 94 Tenn., 644	256
Memphis Street Ry. Co. v. State, 110 Tenn., 613	409
Memphis St. Ry. Co. v. Haynes, 112 Tenn., 712	692
Menteer v. Fruit Co., 240 Mo., 177	295
Meredith v. Dibrell, 127 Tenn., 387	516
Merriman v. Magiveny, 59 Tenn., 494	167
Miller v. Childress, 21 Tenn., 319	418
Miller v. White, 76 Am. St. Rep., 805	53
Miner v. Travelers' Ins. Co., 3 Ohio S. & C. P. Dec., 289	16
Mitchell v. Bank, 27 Tenn., 216	637
Moody v. Boston, etc., R. Co., 189 Mass., 277	11
Moore v. Mayor, etc., Chattanooga, 55 Tenn., 379	390
Moore v. Sharp, 98 Tenn., 491	144
Moore v. State, 37 Tenn., 510	323
Morelock v. Bernard, 83 Tenn., 169	196
Morgan Bros. v. Coal & Iron Co., 134 Tenn., 244	580
Morris v. Railroad, 124 Tenn., 524	301
Morrison v. State, 116 Tenn., 534	324
Morrow v. State, 29 Tenn., 120	369
Morse v. Sweenie, 15 Ill. App., 436	498
Motlow v. State, 125 Tenn., 547	396
Mulvey v. State, 43 Ala., 316	359
Mutual Benefit Life Ins. Co. v. Martin County, 104 Minn., 692	245

N

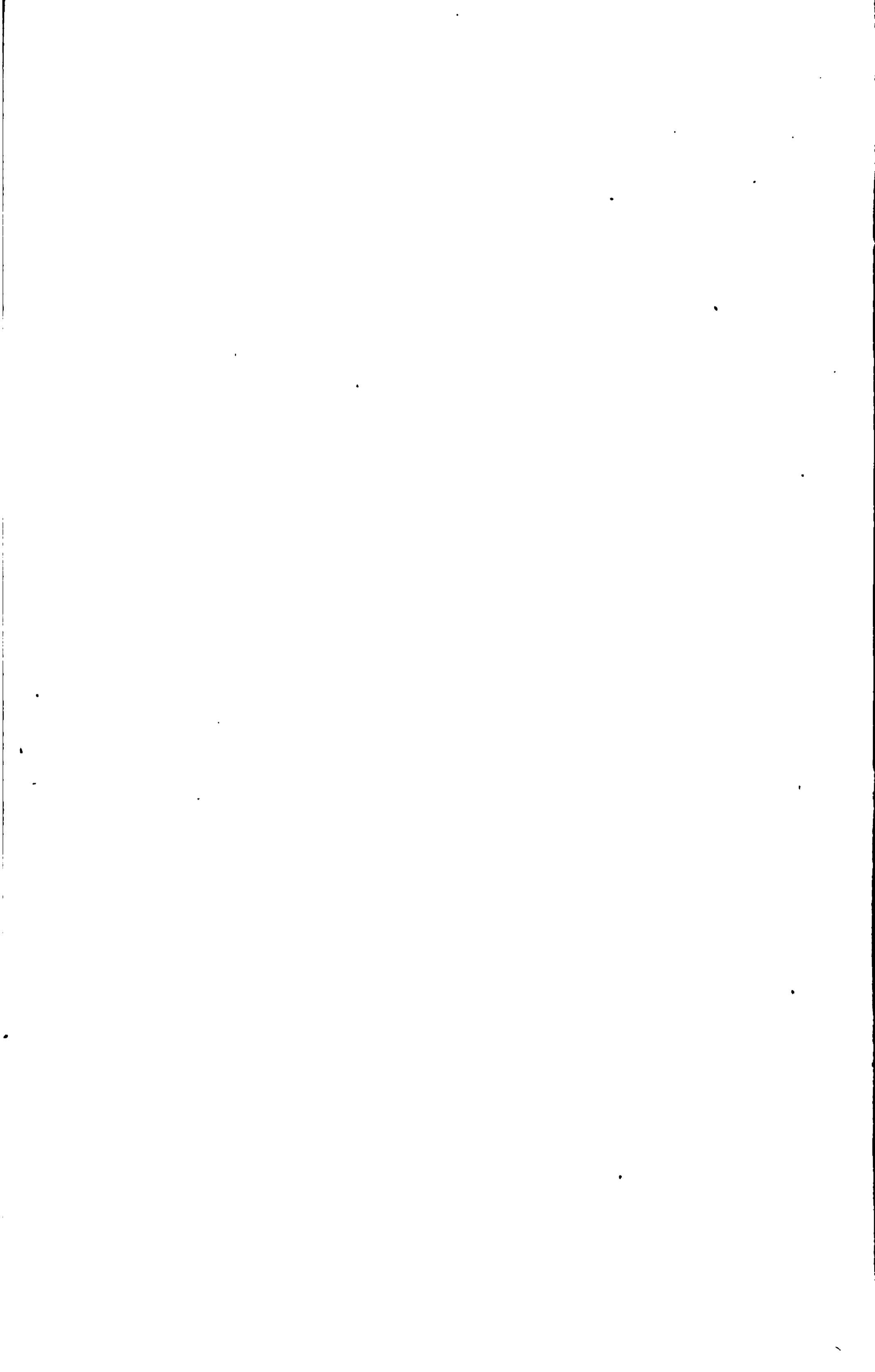
Nance v. Piano Co., 128 Tenn., 1	61
Nashville, etc., R. Co. v. Elliot, 41 Tenn., 611	13
Nashville Life Ins. Co. v. Mathews, 76 Tenn., 499	224
Nashville R. Co. v. Norman, 108 Tenn., 324	692
Nashville Trust Co. v. First National Bank, 123 Tenn., 617	428
National Bank of Newburgh v. Bigler, 83 N. Y., 51	520
Newgass v. St. L., etc., R. Co., 54 Ark., 140	201
Newman v. State, 65 Tenn., 164	524
New York Lubricating Oil Co. v. Pusey, 211 Fed., 625	295
Noel v. Scoby, 49 Tenn., 20	329
Noell v. Power Co., 130 Tenn., 245	625
Norfolk, etc., R. R. Co. v. Consolidated Turnpike Co., 111 Va., 131 .	206
Norwood v. Clem, 143 Ala., 556	237
Northern Indiana R. R. Co. v. Connelly, 10 Ohio St., 159	258

O

Ohio L. Ins. Co. v. Merchants' L. Ins. Co., 30 Tenn., 1	4
Overton v. Lea, 108 Tenn., 505	181

P

Page v. Gillentine, 74 Tenn., 240	563
Palmer v. Express Co., 129 Tenn., 116	419



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1918.

IRVING WHALEY *v.* E. W. KING *et al.*

(*Knoxville*. September Term, 1918.).

1. CORPORATIONS. Purchasing own stock. Recovery.

In the absence of statutory authority, a corporation cannot purchase its own stock, and if it attempts to do so it may recover the amount paid to the stockholder, or if it becomes insolvent its receiver or assignee may have such recovery. (*Post*, pp. 3, 4.)

Cases cited and approved: Civil Service Investment Ass'n. *v.* Thomas, 138 Tenn., 77; Cartwright *v.* Dickinson, 88 Tenn., 476; Green *v.* Ashe, 130 Tenn., 615.

**2. BANKRUPTCY. Actions by trustee. Set-off and counterclaim.
"Mutual credits and debts."**

Where corporation purchased its own stock and became bankrupt, its trustee having brought suit to recover the amount paid the stockholder, the latter could not set off against the recovery an indebtedness of the corporation to him, since he received the money for the stock as a trustee for the creditors; the capital stock being a trust fund, and the case not being one of mutual credits and debts within the meaning of the bankruptcy act. (*Post*, pp. 4-6.)

Whaley v. King.

Cases cited and approved: *Ohio L. Ins. Co. v. Merchants' L. Ins. Co.*, 30 Tenn., 1; *Marr v. Bank of W. Tenn.*, 44 Tenn., 471; *Kelly Bros. v. Fletcher*, 94 Tenn., 1; *Shields v. Clifton Hill Land Co.*, 94 Tenn., 123; *Vance v. McNabb Coal & Coke Co.*, 92 Tenn., 47; *Jennings Neff & Co. v. Ice Co.*, 128 Tenn., 281; *Western Tie & Timber Co. v. Brown*, 196 U. S., 502; *Sawyer v. Hoag*, 17 Wall., 610; *Kiskadden v. Steinle*, 203 Fed., 375; *Scoville v. Thayer*, 105 U. S., 143.

3. COURTS. Construction of Bankruptcy Act.

In an action in State court by a trustee in bankruptcy involving the construction of the Bankruptcy Act, the decisions of the United States supreme court are controlling. (*Post*, p. 6.)

Acts cited and construed: Acts 1898, ch. 546.

Cases cited and approved: *Trust Co. v. Bank*, 91 Tenn., 336; *Bank Cases*, 92 Tenn., 487; *Lumber Co. v. Lumber Co.*, 128 Tenn., 11.

4. APPEAL AND ERROR. Insufficient proof.

Where both parties appealed from the judgment, and the transcript did not contain the amended record, which the judgment referred to, and which would have justified a larger recovery, the cause will be remanded for the taking of further proof to establish proper amount of recovery. (*Post*, pp. 6, 7.)

FROM SULLIVAN.

Appeal from the Chancery Court of Sullivan County.
—**HON. HAL H. HAYNES**, Chancellor.

ASHWORTH & HACKETT, for complainant.

E. K. BACKMAN, for defendants.

Whaley v. King.

MR. JUSTICE GREEN delivered the opinion of the Court.

The Bristol China Company is a Tennessee corporation, whose affairs are being wound up in the bankruptcy court at Bristol. The complainant, Irving Whaley, is its trustee in bankruptcy.

E. W. King subscribed to fifty shares of the capital stock of this corporation, of the par value of \$5,000. Some time later he entered into a transaction with the corporation whereby the latter undertook to purchase from him these shares of its own stock. This suit is brought by the trustee to recover from King the amount of money paid to him on account of this attempted repurchase of the said shares by the corporation.

The chancellor rendered a decree in favor of the complainant, but allowed King to set off against this recovery a certain sum of money in which the corporation had become indebted to him by reason of his indorsement of its notes.

The trustee appealed from so much of the decree as allowed the set-off to King, and King has filed the record for writ of error challenging the recovery decreed against him in favor of the trustee. The claim of King against the corporation exceeded the amount of the decree against him.

We think the chancellor was correct in directing a judgment in favor of the trustee in bankruptcy against King. In Tennessee a corporation is not permitted to purchase shares of its own stock, in the absence of statutory authority. *Civil Service Investment Ass'n. v. Thomas*, 138 Tenn., 77, 195 S. W., 775; *Cartwright v.*

Whaley v. King.

Dickinson, 88 Tenn., 476, 12 S. W., 1030, 7 L. R. A., 706, 17 Am. St. Rep., 910.

If such a purchase is attempted, the corporation may recover of the stockholder the amount paid him on account of the transaction, or, if the corporation become insolvent, its receiver or assignee is entitled to such recovery. *Civil Service Investment Ass'n v. Thomas, supra*; *Green v. Ashe*, 130 Tenn., 615, 172 S. W., 293.

The chancellor, however, erred in holding that King was entitled to offset the indebtedness of the corporation to him against the decree in favor of its trustee in bankruptcy.

In this jurisdiction it is well established that the capital stock of a corporation is a trust fund for the benefit and security of its creditors. *Ohio L. Ins. Co. v. Merchants' L. Ins. Co.*, 11 Humph. (30 Tenn.), 1, 53 Am. Dec., 742; *Marr v. Bank of W. Tenn.*, 4 Cold. (44 Tenn.), 471; *Kelly Bros. v. Fletcher*, 94 Tenn., 1, 28 S. W., 1099; *Shields v. Clifton Hill Land Co.*, 94 Tenn., 123, 28 S. W., 668, 26 L. R. A., 509, 45 Am. St. Rep., 700.

Corporate assets are a trust fund to the extent that creditors are entitled to payment of their debts before any distribution of such property is made among stockholders. *Vance v. McNabb Coal & Coke Co.*, 92 Tenn., 47, 20 S. W., 424; *Jennings Neff & Co. v. Ice Co.*, 128 Tenn., 231, 159 S. W., 1088, 47 L. R. A. (N. S.), 1058.

King testified that he sold these shares to the corporation with the understanding that they were to be resold by it to other parties. He failed to establish this contention, however, by a preponderance of the testimony. At any rate, no other sale of the shares was made by the corporation.

Whaley v. King.

As the matter then appears, Mr. King has unlawfully received part of the capital stock of this corporation in exchange for his shares of stock; that is to say, he has become possessed of part of a trust fund wrongfully diverted. Taking with full notice, he occupies the relation of a trustee to creditors, represented by the trustee in bankruptcy in this suit. The case, therefore, is not one of mutual credits and debts within the meaning of the bankrupt law, and no set-off was permissible. *Western Tie & Timber Co. v. Brown*, 196 U. S., 502, 25 Sup. Ct., 339, 49 L. Ed., 571.

The defendant here is in the same plight as is a stockholder who has failed to pay his subscription to the capital stock of the corporation. In each case there is an obligation to the same trust fund. The two obligations are of the same character. Corporate creditors have a right to demand that all stockholders pay in the amount of their subscriptions to capital stock. Such creditors have an equal right to demand that such sums so paid in be allowed to remain by the stockholders as security for the debts of the corporation.

Whether the stockholder fails to pay his subscription in the first instance, or, having paid, unlawfully withdraws the amount paid in—in either event his indebtedness is of a trust character, of which the creditors of the corporation are the beneficiaries.

It is well settled that a stockholder is not entitled to set off his claim upon a corporation against his indebtedness for an unpaid subscription to its capital stock, and this principle controls the case before us. *Sawyer v. Hoag*, 17 Wall., 610, 21 L. Ed., 731; *Kiskadden v. Steinle*, 203 Fed., 375, 121 C. C. A. 559; *Sco-*

Whaley v. King.

ville v. Thayer, 105 U. S., 143, 26 L. Ed., 968; and many decisions from state courts collected in a note in Ann. Cas., 1913E, 1025.

This being a suit by the trustee in bankruptcy with reference to the administration of a bankrupt estate, involving the application and construction of the federal bankrupt statute (Act July 1, 1898, chapter 541, 30 Stat., 544), as to the right of set-off, the decisions of the United States supreme court are controlling. There is, however, no conflict between the decisions of that court and our own in the matter here presented. The defendant relies on *Trust Co. v. Bank*, 91 Tenn., 336, 18 S. W., 822, 15 L. R. A., 710; *Bank Cases*, 92 Tenn., 437, 21 S. W., 1070, 36 Am. St. Rep., 96; *Lumber Co. v. Lumber Co.*, 128 Tenn., 11, 156 S. W., 465, 46 L. R. A. (N. S.), 62, Ann. Cas., 1914D, 744. In these cases set-offs were allowed to debtors of insolvent corporations. However, the corporate debts sought to be enforced were all simple debts, involving no trust relation and no obligation to capital stock. The debts of the corporations and of their creditors were mutual and in the same right, and were therefore properly set off.

The defendant insists upon his writ of error that the amount of the chancellor's decree against him was erroneous. According to the proof in the case, it appears that defendant received \$1,449 in payment for the shares of stock turned in by him to the corporation. The decree recites that it appears from an amended record that he received \$3,581.91. No such amended record is embodied in the transcript set up.

A suggestion of diminution of the record is made in this court by the complainant, through which it is sought

Whaley v. King.

to bring before us a petition for a rehearing and exhibits said to have been considered by the court below. An inspection of this petition, however, shows that, while it was marked "Filed" in the lower court, this notation has been erased, and, so far as we can see, the petition for a rehearing was not a part of the record below. Even if it had been, the exhibits presented by it are not authenticated in such a way as to have justified the chancellor in accepting them as the basis of his decree, unless with consent of counsel.

All the proof was taken in a very informal and irregular manner, and it is impossible to tell from the record before us just what amount of money was paid to the defendant by the corporation for his shares of stock. In order, therefore, to do justice to the parties, this case must be remanded to the trial court for further proof, to show the true amount paid to King by the bankrupt concern for these shares.

The case will accordingly be reversed and remanded for further proceedings in accordance with this opinion.

The costs of this court will be divided between the parties, and the cost below will be adjudged by the chancellor.

N., C. & St. L. Ry. Co. v. Newsome.

NASHVILLE, C. & ST. L. RY. CO. v. JAMES NEWSOME *et ux.*

(Knoxville. September Term, 1918.)

1. CARRIERS. Passengers. Assisting passenger to alight.

Where passenger is old or infirm, or place of alighting from train is dangerous, or there are other circumstances indicating need of assistance, carrier is bound to exercise highest degree of care in assisting passenger to alight; but where place is safe, and there is nothing to indicate help is needed, carrier need not render assistance. (*Post*, pp. 10, 11.)

Case cited and approved: Southern Ry. Co. v. Mitchell, 98 Tenn., 27.

2. CARRIERS. Passengers. Voluntary assistance to passengers in alighting.

Carrier's employees, who volunteer assistance to passenger in boarding or alighting, although assistance is unnecessary, are bound to exercise reasonable care in so doing, but are not held to highest degree of care. (*Post*, pp. 11, 12.)

Cases cited and approved: Moody v. Boston, etc., R. Co., 189 Mass., 277; Hanlon v. Central R. Co. of N. J., 187 N. Y., 73; St. Louis, I. M. & S. Ry. Co. v. Green, 85 Ark., 117; Walker v. Quincy, etc., R. Co., 178 S. W., 108.

3. TRIAL. Instructions. Assumption as to facts.

In passenger's action for injuries sustained in alighting from train, an instruction on duty of assistance, which assumed the fact in issue that place where passenger alighted was dangerous, was erroneous. (*Post*, pp. 12-14.)

Cases cited and approved: Nashville, etc., R. Co. v. Elliott, 41 Tenn., 611; Illinois Central R. Co. v. Kuhn, 107 Tenn., 106.

N., C. & St. L. Ry. Co. v. Newsome.

FROM HAMILTON.

Appeal from the Circuit Court of Hamilton County.
—NATHAN L. BACHMAN, Judge.

BROWN SPURLOCK & BROWN, for appellant.

TATUM, THACH & LYNCH, for appellee.

MR. JUSTICE GREEN delivered the opinion of the Court.

This suit was brought by Newsome and wife to recover damages for injuries alleged to have been sustained by Mrs. Newsome in alighting from one of the trains of plaintiff in error, on which she was a passenger, at the town of Jasper.

The particular train was of unusual length and when it stopped at this station the rear coach, in which Mrs. Newsome was riding, did not reach the station platform. In getting off this car Mrs. Newsome was assisted by a flagman, and she avers that by reason of the dangerous character of the place at which she was invited to alight, and the negligence of the flagman who helped her down, her arm and shoulder were wrenched, and that she has suffered much pain in consequence. There was a verdict and judgment in her favor below. This judgment was reversed by the court of civil appeals, on account of a certain instruction given to the jury by the trial judge, which the court of civil appeals held erroneous.

The railway company denied that the place at which Mrs. Newsome alighted was in any sense a dangerous

N., C. & St. L. Ry. Co. v. Newsome.

place. While it was conceded that she did not get off at the platform, the employees of the railway *company* testified that the place where she did get down was a level and well-beaten path in easy distance of the car steps. Mrs. Newsome testified that the place was sloping and rocky, and that the flagman who aided her roughly grasped her arm. The flagman denied that he was rough or failed to exercise all proper care in aiding her.

The trial judge submitted to the jury the issue as to the character of the place at which the plaintiff below alighted.

When he came to charge on the question of the assistance rendered to this lady by the flagman, his honor used the language for which the court of civil appeals directed a new trial:

“If the greater weight of the proof, gentlemen of the jury, further shows you that an agent of the defendant company, the flagman, undertook to assist this plaintiff when she was a passenger to alight there at Jasper, then the law requires of him that he shall exercise the highest degree of care in undertaking to assist her in alighting; and if you believe he was negligent in undertaking to assist her from the car, or in the manner in which he assisted her in getting from the car, and that brought about the injury to her, that is his negligence, his failure to exercise the highest degree of care in the way he assisted her, then she would be entitled to recover at your hands.”

Whether or not a carrier is under obligation to render personal assistance to a passenger in boarding or leaving its vehicles depends on the circumstances of each

N., C. & St. L. Ry. Co. v. Newsome.

case. If the place is dangerous, or if the passenger is aged or infirm, or if the circumstances are such as to indicate that the passenger requires help, it may become the duty of the carrier to render such assistance. If, on the contrary, passengers are invited to board or alight at a safe and proper place, and there is nothing to indicate that they require assistance, it is not the duty of the carrier to render them aid in boarding or alighting. *Southern Ry. Co. v. Mitchell*, 98 Tenn., 27, 40 S. W., 72; 10 C. J., 932.

If the employees of the carrier volunteer assistance to the passenger in boarding or alighting, although such assistance may not be necessary or required, such employees are bound to exercise reasonable care in such undertaking. The employees, however, are not required, under such circumstances, to exercise the highest degree of care.

The Supreme Judicial Court of Massachusetts has held, where a passenger does not need assistance in alighting from a train, but the conductor undertakes to assist him, in compliance with a rule of the company requiring conductors to render assistance to passengers boarding or alighting from trains, that the company is liable only for the failure of the conductor to exercise reasonable care under the circumstances. *Moody v. Boston, etc., R. Co.*, 189 Mass., 277, 75 N. E., 631.

A like rule has been announced in *Hanlon v. Central R. Co., of N. J.*, 197 N. Y., 73, 79 N. E., 846, 10 L. R. A. (N. S.), 411, 116 Am. St. Rep., 591, 10 Ann. Cas., 366; *St. Louis, I. M. & S. Ry. Co. v. Green*, 85 Ark., 117, 107 S. W., 168, 14 L. R. A. (N. S.), 1148.

N., C. & St. L. Ry. Co. v. Newsome.

This court has approved a charge containing the same thought in the case of *Southern R. Co. v. Mitchell, supra*, although this particular question was not in issue in that case.

It has been held, however, that in cases where the surroundings were such as to render assistance necessary the same high degree of care was required as must be exercised toward passengers during actual transportation. 10 C. J. 932, citing *Walker v. Quincy, etc., R. Co. (Mo.)*, 178 S. W., 108.

In the case before us, if the place where she alighted was dangerous and of such a character as to require that the servants of the carrier assist this passenger in alighting, then, in our opinion, it was proper for the trial judge to instruct the jury that the carrier's servant was bound to the exercise of the highest degree of care in his efforts to help her.

If, on the other hand, the place was not dangerous, and the carrier was not under obligation to assist this passenger, only reasonable care was required of the carrier's servant in the exercise of the voluntary assistance offered.

Whether or not the place was dangerous was an issue in the case. The charge of the trial judge assumed that it was dangerous, and imposed upon the carrier that degree of care demanded in such a situation, and was for this reason erroneous.

We think the distinction noted rests on a sound basis. Where the place at which a passenger is invited to alight is dangerous, it is the carrier's duty to render assistance to the passenger, as an incident to safe transportation. All the authorities agree that as to passengers in course

N., C. & St. L. Ry. Co. v. Newsome.

of carriage, and boarding and alighting, the carrier must perform its duties with the highest degree of care. *Nashville, etc., R. Co. v. Elliot*, 1 Cold. (41 Tenn.), 611, 78 Am. Dec., 506; *Illinois Central R. Co. v. Kuhn*, 107 Tenn., 106, 64 S. W., 202; 10 C. J., 861, and cases cited.

Where the place is not dangerous, and no other reason appears for proffering aid, it is not the carrier's duty to assist the passenger in alighting. Although such assistance may be tendered, it is not one of the carrier's duties imposed by law, and therefore no more than ordinary care is required in its exercise.

The judgment of the court of civil appeals is affirmed, and the case remanded for a new trial.

Conrad v. Life & Accident Ins. Co.

A. B. CONRAD v. INTERSTATE LIFE & ACCIDENT INSURANCE COMPANY.

(Knoxville. September Term, 1918.)

1. INSURANCE. Health and accident insurance. Extent of liability.

Under accident policy limiting liability to three weeks' benefit for disability from hernia, one receiving an accidental hernia was not limited to three weeks' recovery. (*Post*, pp. 16, 17.)

Cases cited and approved: *Travelers' Ins. Co. v. Murray*, 16 Colo., 296; *Atl. Assurance Ass'n v. Alexander*, 104 Ga., 709; *Miner v. Travelers' Ins. Co.*, 3 Ohio S. & C. P. Dec., 289; *Berry v. United Commercial Travelers of America*, 172 Iowa, 429.

Case cited and distinguished: *Keen v. Continental Casualty Co.*, 175 Iowa, 513.

2. INSURANCE. Payment of premiums. Presumptions.

The presumption is that the insured has paid all premiums due when he exhibits a receipt for the last month's premium. (*Post*, p. 17.)

3. ACCORD AND SATISFACTION. Fraud. Pleading.

In action at law, where accord and satisfaction is pleaded, plaintiff may set up fraud in securing the accord. (*Post*, pp. 17, 18.)

Cases cited and approved: *Brundige v. Railroad*, 112 Tenn., 530; *Byers v. Railroad*, 94 Tenn., 345; *Street Railway Co. v. Giardino*, 116 Tenn., 368.

4. ACCORD AND SATISFACTION. Rescission. Return of Money received.

Where insured accepted less than the amount due as accord and satisfaction, and the insurer in his action set up such accord and satisfaction, which the insured alleged was obtained by fraud, the return of the money received was not prerequisite to recovery of the true amount due, since in any event the insurer was liable for more than it had paid. (*Post*, p. 18.)

Conrad v. Life & Accident Ins. Co.

Cases cited and approved: *Fox v. Hudson's Ex'x et al.*, 150 Ky., 115;
Street Railway Co. v. Giardino, 116 Tenn., 368.

FROM KNOX

Appeal from the Circuit Court of Knox County.—
Hon. Von A. HUFFAKER, Judge.

S. E. HODGES, for plaintiff.

NOBLE SMITHSON, for defendant.

MR. JUSTICE MCKINNEY delivered the opinion of the Court.

This is a suit on an accident policy issued by the defendant to the plaintiff.

During the life of the policy the plaintiff sustained an accident causing hernia. Part 8 of the policy is as follows:

“In the event of the disability resulting from rheumatism, paralysis, tuberculosis, sciatica, lumbago, malaria, neuritis, cystitis, varicose veins, hernia, dementia, pellagra, insanity, or chronic infirmity, then in any such case referred to in this paragraph the limit of the company's liability shall be a sum not exceeding three weeks if a regular or one month's indemnity if a special policy within a period of twelve months, as provided in part 7 of this policy.”

The defendant paid the plaintiff for one month's disability, but declined to pay for the remainder of the

Conrad v. Life & Accident Ins. Co.

period that he was disabled, relying upon the above clause as a defense.

The plaintiff contends that the hernia sustained by him is not the kind of hernia contemplated by the contract, and that, therefore, he is not limited to four weeks' indemnity for the injury suffered by him; while, on the other hand, the defendant contends that the clause covers hernia in all of its forms.

While this question is one of first impression in this state, it has frequently been before the courts in other States.

"A provision in a policy that the insurance shall not cover injury or death resulting from or due to hernia or rupture will not prevent a recovery for the death of the insured caused by rupture or hernia accidentally produced." *Travelers' Ins. Co. v. Murray*, 16 Colo., 296, 26 Pac., 774, 25 Am. St. Rep., 267; *Atl. Assurance Ass'n v. Alexander*, 104 Ga., 709, 30 S. E., 939, 42 L. R. A., 188; *Miner v. Travelers' Ins. Co.*, 3 Ohio S. & C. P. Dec., 289; *Berry v. United Commercial Travelers of America*, 172 Iowa, 429, 154 N. W., 598, L. R. A., 1916B, 617, Ann. Cas., 1918A, 706.

In an extended note to this last case many authorities are cited, and the general rule is stated to be as follows:

"Generally a special provision in an accident insurance policy excepting disability or death due to hernia or rupture does not relieve the insurer from liability where the proximate cause of the death or disability is hernia or rupture caused by an accidental injury."

In the note just referred to the editor says:

"It is, of course, possible so to frame a hernia clause as to exclude liability for hernia caused by an accident.

Conrad v. Life & Accident Ins. Co.

Thus in *Keen v. Continental Casualty Co.*, 175 Iowa, 512, 154 N. W., 409, where the policy . . . provided that 'where accidental injury results in hernia, . . . the amount payable shall be one-fourth of the amount which otherwise would be payable under this policy,' " etc.

From these authorities we are of the opinion that plaintiff is not limited to one month's indemnity, and that the first five assignments of error going to this question are not well taken.

The sixth assignment of error is to the effect that the court of civil appeals was in error in holding that the policy was in effect at the time of the accident.

A sufficient answer to this is the admission by the defendant of liability, and furthermore the plaintiff testifies that he had paid his premiums, and exhibits a receipt for his September premium, and the presumption is that by paying his September premium, and same having been accepted by the company, that he had paid the preceding premiums. The injury occurred in September.

The seventh and ninth assignments of error challenge the action of the court of civil appeals in decreeing that there was no accord and satisfaction, and in not holding the release, executed by the plaintiff, effective.

"When a plea of accord and satisfaction is interposed, it is proper in a suit at law for the plaintiff to meet such a plea by a replication that the release was obtained by fraud, whether the fraud be in the execution or in representation of material facts inducing execution, and the question of fraud is one for the jury." *Brundige v. Railroad*, 112 Tenn., 530, 81 S. W., 1248;

Conrad v. Life & Accident Ins. Co.

Byers v. Railroad, 94 Tenn., 345, 29 S. W., 128; *Street Railway Co. v. Giardino*, 116 Tenn., 368, 92 S. W., 855.

The plaintiff contends that the release was procured by fraud.

The eighth assignment of error is to the effect that the plaintiff would have to return the \$30 paid him before he would be in a position to recover more.

"The general rule that one receiving money in discharge of a liability must restore it before he can avoid the contract for fraud does not apply, if he is in any event entitled to retain the amount received." *Fox v. Hudson's Ex'x et al.*, 150 Ky., 115, 150 S. W., 49, reported in Ann. Cas., 1914A, 832.

In *Corpus Juris*, vol. 1, p. 571, it is said:

"Where an accord and satisfaction is fully executed, the general rule is that there can be no rescission on the ground of fraud, without restoring or offering to restore what has been accepted in satisfaction.

"The rule, however, is subject to some limitations and exceptions. It does not apply where the defendant admits that what was paid was justly due under the contract sued on."

This does not conflict with *Street Railway Co. v. Giardino*, 116 Tenn., 368, 92 S. W., 855, in which the general rule above announced is approved. The case at bar falls within the exception. The defendant admits that it owed the plaintiff the \$30 paid to him; therefore he did not have to restore the \$30.

The judgment of the court of civil appeals is affirmed.

City of Knoxville v. Yardley.

CITY OF KNOXVILLE *et al.* v. W. F. YARDLEY.

(*Knoxville.* September Term, 1918.)

GARNISHMENT. Implied repeal. Increase of population.

Private Laws 1915, chapter 273, making garnishable wages of officials and employee of municipalities of not more than 44,000 population, admittedly applying to a certain city, was not, as to such city, abrogated by Private Laws 1917, chapter 97, extending the corporate limits to take in adjacent towns, the population of which, with that of the city, would exceed 44,000 according to 1910 census; such repeal being contrary to the apparent legislative intent.

Acts cited and construed: Acts 1915, ch. 273; Acts 1917, ch. 97.

Case cited and approved: Hall v. State, 124 Tenn., 235.

FROM KNOX.

Appeal from the Law Court of Knox County.—Hon. Von A. HUFFAKER, Judge.

J. PIKE POWERS, JR., for City of Knoxville and others.
W. F. YARDLEY, *pro se.*

MR. JUSTICE MCKINNEY delivered the opinion of the Court.

The legislature of 1915 passed an act (Priv. Laws 1915, chapter 273) making it lawful to garnishee the wages of all officials and employees of municipal corporations in the State having a population of not less than

City of Knoxville v. Yardley.

36,000 nor more than 44,000. It is admitted that this act applied to the City of Knoxville.

The legislature in 1917 passed an act (Priv. Laws 1917, chapter 97) extending the corporate limits of Knoxville, so as to take in several incorporated towns adjacent thereto. It is agreed that the population of Knoxville, and that of these other incorporated towns just referred to, combined, according to the census of 1910, would give Knoxville a population exceeding 44,000.

It is insisted by the plaintiff in error that, since the population of Knoxville now exceeds 44,000, the said act of 1915 no longer applies to Knoxville.

We think this case falls within the holding of this court in *Hall v. State*, 124 Tenn., 235, 137 S. W., 500, in which the court states that the intention of the general assembly was that the application of the act should be fixed and continuous, notwithstanding any changes that might occur in its population as shown by any future census, until it should be repealed by a proper legislative act.

It is admitted that, at the time of the passage of the act in question, the population of Knoxville was less than 44,000, and hence to say that the statute was subsequently abrogated by an increase of population in excess of 44,000 would be in direct conflict with the legislative intent, and with the holding of this court in said case of *Hall v. State*, supra.

Furthermore, as stated by the court of civil appeals, it has not been shown by any federal census that the population of Knoxville at the present time, or at the

City of Knoxville v. Yardley.

time of the bringing of the suit in this case, exceeds 44,000. If such a census were taken, it might show a less population.

We find no error in the judgment of the court of civil appeals, and it is affirmed.

City of Knoxville v. Lively.

CITY OF KNOXVILLE v. ARTHUR LIVELY.*

(Knoxville. September Term, 1918.)

1. DAMAGES. Excessive damages. Personal injury.

Where a street car conductor was knocked from the running board of his car to the paved street by striking a negligently placed road roller, and so injured that he remained unconscious until after reaching hospital, where he remained seven days, and was unable to work for some days thereafter, but was paid wages by his employer for lost time, a judgment against the city for \$500 was not excessive. (*Post*, pp. 26, 27.)

2. MUNICIPAL CORPORATIONS. Streets. Obstructions. Personal injury. Evidence.

Evidence, in an action by a street car conductor against a city for personal injuries resulting from negligent obstruction of street by a road roller, held sufficient to support a verdict for plaintiff. (*Post*, pp. 26, 27.)

3. MUNICIPAL CORPORATIONS. Streets. Obstructions. Liability for personal injury.

Where the distance from curb to nearest street car rail was ten feet six inches, and a road roller six feet wide was unnecessarily placed three and one-half feet from curb to fill boiler with water, and the rollers fender was so close as to strike a conductor standing on the running board of his car, the city is liable for personal injury resulting therefrom. (*Post*, pp. 27, 28.)

4. MUNICIPAL CORPORATIONS. Streets. Obstructions. Personal injury. Contributory negligence Evidence.

Evidence held not to sustain defendant city's contention that plaintiff conductor, necessarily standing on the running board of his street

*On excessiveness of verdicts in suits for damages for personal injuries, see note in 14 L. R. A., 677; L. R. A., 1915F, 30.

On the question of contributory negligence as affecting liability of municipal corporation for defects or obstructions in street, see notes in 21 L. R. A. (N. S.), 614, 48 L. R. A. (N. S.), 628.

City of Knoxville v. Lively.

car collecting fares, when struck and injured by a city's negligently placed road roller, was guilty of contributory negligence. (*Post*, pp. 27, 28.)

Cases cited and approved: *Conelly v. Nashville*, 100 Tenn., 262; *Foster v. Water Co.*, 71 Tenn., 42; *Irvine v. Chattanooga*, 101 Tenn., 291; *Chattanooga v. Reid*, 103 Tenn., 616; *Chattanooga v. Dowling*, 101 Tenn., 348; *Kolb v. Knoxville*, 111 Tenn., 311; *Knoxville v. Klasing*, 111 Tenn., 134; *City of Nashville v. Mason*, 137 Tenn., 169.

5. TRIAL. Instructions. Refusal to instruct. Instructions already given.

Requested charge, covered by instructions given, is properly refused. (*Post*, pp. 28-30.)

6. MUNICIPAL CORPORATIONS. Trial. Streets. Obstructions. Personal injury. Contributory negligence. Instructions.

In action against city by a street car conductor, injured by being struck by a road roller left standing too close to passing street cars, an instruction on contributory negligence, in not seeing the roller, held properly refused, as confusing because containing too many different suppositions of cumulative facts. (*Post*, pp. 30, 31.)

7. MUNICIPAL CORPORATIONS. Streets. Obstructions. Duty of a street car conductor.

A street car conductor, standing on the running board of his car collecting fares and discharging passengers, is not bound to keep a constant lookout to escape from a nuisance in the form of a dangerous street obstruction. (*Post*, pp. 30, 31.)

8. MUNICIPAL CORPORATIONS. Negligence of servants. Liability. Performance of strictly governmental duties.

The rule that a city is not liable for its employees' negligence in handling tools and applicances in the performance of a strictly governmental duty does not relieve the city where such instrumentalities are so used as to constitute a temporary or permanent nuisance. (*Post*, pp. 31, 32.)

City of Knoxville v. Lively.

FROM KNOX.

Appeal from the Circuit-Court of Knox County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
HON. VON A. HUFFAKER, Judge.

J. PIKE POWERS, JR., City Attorney, for City of Knoxville.

F. E. LAUGHEAD, for appellee.

MR. COX, Special Justice, delivered the opinion of the Court.

This is an action for damages for personal injuries. At the time of the injury, Lively was working as conductor on one of the street cars of the Knoxville Railway & Light Company, in the city of Knoxville. Two cars were connected, the rear one being designated and known as a trailer. The motorman was on the front car, and Lively was the conductor on the rear car, or trailer; the latter being an open, summer car, with running boards on each side. There was a picnic at Fountain City on the date of the injury in question, toward which the cars in question were headed, and the cars were crowded with passengers. Lively was on the running board of the street car, collecting fares, when he was knocked from the car by a road roller belonging to the city of Knoxville, and which had been left by its

City of Knoxville v. Lively.

agent standing too near the track of the street railway company.

It appears that the road roller was a large ten-ton roller, and that Lively was struck by a thin piece of metal attached to the same, referred to as the mud-guard or mud-scraper, and which protruded beyond the wheel of the roller about six inches. The employee of the city of Knoxville who was in charge of the roller had placed the same in the position above described in order to fill the boiler of same with water from a fire plug by means of a wire hose. The injury occurred on Broadway, and the distance from the curb on that street to the nearest rail of the street car track was ten feet six inches. The width of the road roller was about six feet. It therefore appears that the roller was three and one-half feet from the curb, and constituted an obstruction to the street car track to the extent that the mud-guard would strike any one who might be upon the running board of a passing street car. It also appears that the road roller could have been supplied with water at another place, a short distance away, where it would not have obstructed the street car track. The street car had made a stop at the crossing below where the injury occurred, and Lively was collecting fares from the passengers who embarked at the last stop. He was busy collecting fares and did not see the road roller, and was knocked from the car, having been struck in the side, or back, by the mud-guard. He was rendered unconscious, and did not regain consciousness until after he had reached the hospital. He did not know at the time what struck him. One of the witnesses to the accident testified that when Lively was struck he was

City of Knoxville v. Lively.

jerked suddenly from the car, and that his body turned completely over and struck the bitulithic pavement. The car was running at about six miles per hour. After Lively had remained at the hospital for seven days, and some time thereafter, he returned to the office of the street railway, and there signed a statement in which he released the latter company from any claim as against it, and received from the latter a check for \$18, being the amount of his wages during the time he was absent from his work. In the statement which he signed he stated, among other things, the following: "I am well enough to report for work on June the 19th."

Upon the trial of the case in the circuit court the jury found in favor of plaintiff below, and awarded him \$500 damages. The circuit judge overruled the motion of the city for a new trial, and upon appeal the court of civil appeals affirmed the judgment of the court below. The plaintiff in error has removed the case to this court upon petition for *certiorari*, and has assigned errors, five in number.

The first assignment is the usual one that there is no evidence to support the verdict; the second, that the amount of the recovery is excessive; and the fifth, that the facts do not show negligence upon the part of the city. The third and fourth assignments are directed to the action of the circuit judge in refusing to make certain special charges to the jury which were requested by the plaintiff in error.

The amount of the damages is fully justified by the facts in the case. The charge of the court upon the question was full and correct. This was a question of fact for the jury to decide, and we think their finding is

City of Knoxville v. Lively.

fully justified from the facts before them. The second assignment of error is therefore overruled.

It has been held by this court that a municipality is not liable for injuries occurring by reason of the negligence of its employees in the performance of a governmental function; that is, the performance of some duty which the city owes to the public. Thus, in *Connelly v. Nashville*, 100 Tenn., 262, 46 S. W., 565, it was held that sprinkling the streets was a governmental function, and the city was not liable for the negligence of its employees in operating a street sprinkler. In *Foster v. Water Co.*, 3 Lea, 42, it was held that the city was not liable for the water company's failure to perform its duty under a contract with the city and whose negligence caused the destruction by fire of the house of a citizen. See, also, *Irvine v. Chattanooga*, 101 Tenn., 291, 47 S. W., 419. In *Chattanooga v. Reid*, 103 Tenn., 616, 53 S. W., 93, the construction of a sewer was held to be a governmental act. But in the following cases it has been held that, even though the act be of a governmental nature, the city cannot commit a nuisance in the discharge of such a duty, and, if it does, it is liable for damages resulting therefrom. *Chattanooga v. Dowling*, 101 Tenn., 343, 47 S. W., 700; *Kolb v. Knoxville*, 111 Tenn., 311, 76 S. W., 823; *Knoxville v. Klasing*, 111 Tenn., 134, 76 S. W., 814; *City of Nashville v. Mason*, 137 Tenn., 169, 192 S. W., 915, L. R. A., 1917D, 914.

We think the placing of this ten-ton road roller upon the street so close to the street car track that it was apparent to any one of reasonable and ordinarily prudence that it thus constituted a dangerous obstruction to passengers and employees upon passing street cars

City of Knoxville v. Lively.

was a temporary nuisance. It was absolutely necessary that the conductor be on the running board, and, from the nature of his duties, he could not be on the constant lookout for such obstructions and dangerous instrumentalities. Two of the witnesses to the injury say that Lively, at the time the mud-guard struck him, was in the act of collecting fares, and was reaching inside the car to receive the fares. The inference is therefore warranted that his side or back was toward the street on which the road roller was standing. One witness states that he saw Lively a moment or so before the injury, and that he was walking along the running board, swinging in and out, as the necessity of this movement requires in reaching from one handle-bar of the car to the other; but he says he did not see Lively at the time he was struck by the mud-guard of the road roller. The two other witnesses state that they were looking at Lively at the very time he was struck. Therefore there could be no possible evidence upon which to base the contention of the city that the defendant in error was himself negligent or that his body was extending from the car.

The act of the plaintiff in error in leaving this obstruction on the street constituted more than ordinary negligence—it was the permitting of a temporary nuisance to exist. For the injury which resulted to defendant in error therefrom he is entitled to recover damages. Therefore the first and fifth assignments of error are overruled.

The third and fourth assignments of error are based upon the refusal of the trial judge to give in charge

City of Knoxville v. Lively.

to the jury two special requests made by plaintiff in error. They are:

(1) "The jury may consider any oral or written statements of the plaintiff made to the Knoxville Railway & Light Company on June 18, 1912, if any, so far as it relates to the nature and extent of his injuries, or his state of health on that date, in determining the question of his injury or recovery therefrom."

(2) "If the jury believes that the plaintiff leaned out backwards over the street and was injured, and that the car had slowed up in the middle of the block to pass the road roller, and that he could have seen the road roller, and that under such circumstances a person of ordinary care and prudence would have looked, and the plaintiff did not look, then you would consider these facts in determining whether or not plaintiff was negligent."

We think the circuit judge properly refused to give these special charges to the jury. On the other hand, the giving of same would have constituted error, under the facts of this case. The circuit judge fully and correctly charged the jury concerning the weight to be given to the testimony of witnesses, as to contradictory statements, etc., as well as the degree of care required of an ordinarily prudent man under similar circumstances. As to the statement made to the Railway & Light Company, above referred to, viz. "I am well enough to report for work on June the 19th," plaintiff below testified that he thought when he made the statement he would be well enough to report for work at the time mentioned, but the real nature and extent of his injuries also were shown in the proof. This statement was but a circum-

City of Knoxville v. Lively.

scare or fact to be taken into consideration, together with the other testimony in the case, relative to the elements of damage, the extent of the injury and suffering of plaintiff below, etc., and the matter was fully covered by the general charge of the court.

The same is true as to the second request above quoted. It is not a proper charge, under the facts of this case, because there is no evidence to show that Lively was in any way negligent at the time he was struck by the protruding mud-guard of the road roller. The request is too much involved; contains too many different suppositions of cumulative facts. It would have tended to confuse the jury. It is too narrow in its scope, is not in proper form, and would have been unfair and prejudicial to the rights of plaintiff below. Moreover, under the particular facts of this case, we think it is immaterial as to whether Lively was moving along the running board, his body alternately extending toward the street to some extent, or whether he was leaning toward the inside of the car in the act of collecting fares. In either event, he was in the discharge of his duties, at the only place upon the car where he could properly discharge them, and the very nature of his duties as conductor were such that it would be highly impracticable and unreasonable to expect him to be constantly looking forward in nervous fear of, and escape from, injury from a nuisance in the form of a dangerous obstruction upon the street. Much has been said about whether or not Lively could have seen the road roller for some distance before the car reached the point where the roller was located. The car was going down grade at the point, and the injury hap-

City of Knoxville v. Lively.

pemed in the daytime. As we have stated before, on account of the picnic at Fountain City, and the consequent congestion of passengers on the car, Lively was constantly employed in attending to his duties in the taking on and discharging of passengers and collecting the fares. To expect him to be looking ahead in avoidance of such an obstruction upon the street would be to require of him an extraordinary precaution, and one which would involve a neglect of his duties. There is nothing to show that his attention was called to the obstruction or that he knew of its presence. There was nothing to put him upon notice of the obstruction. It is true the motorman decreased the speed of the car in passing, and the latter says he looked back and saw no one upon the running board. We think, however, that this but lends weight to the conclusion that Lively was leaning toward the inside of the car in the act of reaching in and collecting fares, and that this was the reason the motorman did not, and possibly could not, see Lively on the running board of the second car. Also it appears from the proof that, even if the road roller had been seen, the instrumentality of danger was the mud-guard, extending, as it did, from the road roller some six inches. This was what struck defendant in error and knocked him from the car, and it is doubtful from the proof whether it could have been seen, or the danger of its position realized, until too late.

For the negligence of its employees in the use and operation of its tools and appliances, in the performance of a strictly governmental duty, a city is not liable for injuries occasioned thereby; but when such instrumentalities are so used and employed as to constitute

City of Knoxville v. Lively.

nuisances, whether temporary or permanent, the city is liable.

The third and fourth assignments of error are also overruled, and the decree of the court of civil appeals is affirmed.

State v. Cooley.

THE STATE *v.* GEORGE COOLEY.*

(Knoxville. September Term, 1918.)

1. INDICTMENT AND INFORMATION. Charge against individual, Bad check law.

Indictment for violation of Public Acts 1915, chapter 178, the bad check law, held against defendant as an individual, not as president of a grocery company. (*Post*, pp. 36, 37.)

Acts cited and construed: Acts 1915, ch. 178.

2. FALSE PRETENSES. Bad check law, Gravamen of charge, Gravamen of charge that defendant violated Public Acts 1915, chapter 178, the bad check law, is not the issuance of a check, but is the obtaining, with fraudulent intent, of money, or other property, or credit, by means of a check. (*Post*, pp. 37, 38.)**3. STATUTES.** Criminal statute. Construction.

Construction of criminal statute which in many instances would defeat legislative purpose will not be adopted unless forced by express language. (*Post*, p. 38.)

4. FALSE PRETENSES. Bad check law. "Of which he is the maker or drawer."

Defendant violated Public Acts 1915, chapter 178, the bad check law, though he signed check for which he obtained goods as president of grocery company; statutory phrase "of which he is the maker or drawer" merely limiting application to persons obtaining money or property with fraudulent intent by check which they draw personally or in representative capacity. (*Post*, pp. 38-45.)

Acts cited and construed: Acts 1915, ch. 178.

*Authorities passing on the question as to whether mere drawing of check on a bank in which the drawer has no funds or credit and passing the same is false pretenses, are collated in notes in 17 L. R. A. (N. S.), 244; 27 L. R. A. (N. S.), 1032, 52 L. R. A. (N. S.), 919.

State v. Cooley.

~~Reco. after and distinguished: State v. Willis, 130 Tenn., 408; Kizer
v. State, 140 Tenn., —; Milbrath v. State, 138 Wis., 354; State ex
v. Standard Oil Co., 49 Ohio St., 137; Hempfling v. Burr, 59
Ia. 2d 244.~~

FROM WASHINGTON.

Appeal from the Criminal Court of Washington County.—HON. DANA HARMON, Judge.

Wm. H. SWIGGART, Jr., Assistant Attorney-General, for the State.

PAUL E. DIVINE and D. M. GUINN, for appellee.

MR. JUSTICE McKINNEY delivered the opinion of the Court.

Under chapter 178 of the Public Acts of 1915 of the General Assembly of the State of Tennessee, the defendant, George E. Cooley, was indicted for obtaining goods and credit by giving a check on a bank in which there were no funds to pay same.

On motion of the defendant the indictment was quashed and the State has appealed and assigned errors.

The body of said act is as follows:

“Section 1. Be it enacted by the general assembly of the State of Tennessee, that any person who shall obtain, with fraudulent intent, money or other property which may be subject of larceny, or who shall obtain credit with like intent, by means of a check, draft or order, of which he is the maker or drawer, which is not

State v. Cooley.

paid by the drawee, shall be guilty of a misdemeanor if the amount or value is thirty dollars or less, if the amount or value is more than thirty dollars he shall be guilty and punishable as in the case of larceny, of such money or other property, or of anything of value obtained on such credit, unless payment of such check, draft or order after giving seven days' written notice mailed to the drawer's last known address, and the fact that such maker or drawer did not have on deposit or to his credit with the bank, person, firm or corporation upon which such check, draft or order is drawn sufficient funds to pay the same when presented unless such check or draft is paid or accepted when presented, shall be *prima-facie* evidence of fraudulent intent.

"Sec. 2. Be it further enacted, that all laws and parts of laws in conflict herewith be, and the same are, hereby repealed, and that this act take effect from and after its passage, the public welfare requiring it."

The indictment is in the following words:

"The grand jurors for the State and county aforesaid present and say that George E. Cooley on the 18th day of June, 1917, in the county aforesaid, unlawfully and feloniously did with fraudulent intent obtain money and other property consisting of meat and did obtain credit with like intent from the said H. H. Swadley by means of a check which he as president of the Pure Food Grocery Company drew for fifty dollars (\$50), payable to H. H. Swadley, and which said check was not paid by the said Pure Food Grocery Company, or said George E. Cooley, and the said check having not been paid after the said George E. Cooley, as president of the said Pure Food Grocery Company, had been given seven

State v. Cooley.

days' written notice as required by law, to make the same good, and the said George E. Cooley, nor the Pure Food Grocery Company, did not have on deposit or to his or its credit with the bank upon which check was drawn sufficient funds to pay the same when it was presented for payment. Against the peace and dignity of the State."

The fourth ground of the motion to quash was the only one relied upon by the defendant, and it is as follows:

"The acts of Tennessee, as to the issuance of checks which are not paid and as to which there are no funds to cover the same, does not by its terms or provisions cover or comprehend a check issued by a corporation, nor is it applicable to an agent of a corporation, acting for it, to compel any such agent to become or be a guarantor or surety for corporate business and transactions. Hence under the averments of the indictment no offense is charged as a matter of law, and no criminal liability exists."

The circuit judge found and adjudged:

"That said check law in question does not apply to corporations and checks issued by a corporation, and that in this instance the said George E. Cooley is indicted as president of the Pure Food Grocery Company, and that he is not indicted personally and cannot be held personally under the allegations of the indictment, and he therefore quashes said indictment and dismisses said defendant."

We think the learned circuit judge was in error in holding that the defendant was indicted as president of

State v. Cooley.

the Pure Food Grocery Company, a corporation. The indictment says:

"That George E. Cooley on the 18th day of June, 1917, in the county aforesaid, unlawfully and feloniously did with fraudulent intent obtain money and other property consisting of meat and did obtain credit with like intent from the said H. H. Swadley," etc.

It will thus be seen that it was George E. Cooley, individually, and not George E. Cooley, president of the Pure Food Grocery Company, that was charged with fraudulently obtaining money, meat, and credit, which is, as will be more fully shown later on, the gravamen of the offense.

The indictment then recites the method by which he fraudulently procured the property and credit, saying, "by means of a check which he as president of the Pure Food Grocery Company drew for fifty dollars (\$50), payable to H. H. Swadley," and then charges that it was not paid by the Pure Food Grocery Company or by George E. Cooley after they had been given seven days' written notice, and that neither the Pure Food Grocery Company nor George E. Cooley had on deposit with the bank, upon which the check was drawn, sufficient funds to pay the same when it was presented for payment.

The gravamen of the charge against the defendant, as defined by the statute, is not the issuance of a check, but is the obtaining, with fraudulent intent, money or other property or credit by means of a check. The "bad check" is merely the prohibited means of accomplishing the fraud. The legislative purpose was to prevent the obtaining of money or other property with fraudulent intent, and to protect owners

State v. Cooley.

of property and money from being defrauded in such a way.

The legislative purpose to protect the public against fraud would not be wholly accomplished by construing the act to have no reference to the perpetration of a fraud by means of a check drawn by an officer of a corporation. The legislative purpose would be defeated in many instances by such construction, and that construction will not therefore be adopted by the court unless it is forced by the express language of the statute.

There is no language in the statute which exempts from its operation a person who shall obtain money or property with fraudulent intent by means of a check which he draws or makes in a representative capacity. If he draws the check as the representative or officer of a corporation, he is none the less the maker or drawer within the contemplation of this statute, and the fraud which the statute is designed to prevent is personal to him. There is no doctrine of agency in the criminal law which will permit an officer of a corporation to shield himself from criminal responsibility for his own act on the ground that it was the act of the corporation and not his personal act.

In construing this statute, the phrase "of which he is the maker or drawer" is to be given its literal meaning and the words "maker or drawer" are to be understood in their usual and ordinary sense, and are not to be given the technical meaning imputed to them when used in the negotiable instruments law. This rule of construction is clearly to be followed if it is necessary to render the statute effective to accomplish the legislative purpose, i. e., the suppression of the practice of

State v. Cooley.

fraudulently obtaining money or property by means of a bad check. If a person draws or makes a check and uses it with fraudulent intent to obtain money or credit, and the check is not paid in any of the ways referred to in the statute, every element of the crime defined by the statute is present, and it is immaterial whether he drew the check or made it personally or in a representative character. The phrase in question, "of which he is the maker or drawer," should therefore be construed merely to limit the application of the statute to persons who obtain money or other property with fraudulent intent by means of a check which he himself makes or draws, regardless of whether the person in question makes or draws the check personally or in some representative capacity. *State v. Willis*, 130 Tenn., 408, 409, 170 S. W., 1030; *Harrison Kizer v. State*, 140 Tenn., —, 205 S. W., 423, opinion filed August 6, 1918.

In *Kizer v. State*, supra, the court had under consideration the constitutionality and construction of the statute of 1917 prohibiting the transportation of intoxicating liquors. The statute prohibited the receipt of liquors which had been received directly or indirectly "from a common or other carrier." An effort was made to limit the phrase "common or other carriers" to "carriers for hire," the basis for the contention being that in the law of bailments, "carrier" had taken on a special and limited meaning including only carriers for hire, common and private. This court refused to attribute the limited and special meaning of the phrase to its use in the statute under consideration, saying that, in enacting the statute, the legislature was not concerned with the law of bailments, but was taking a

City of Knoxville v. Lively.

nuisances, whether temporary or permanent, the city is liable.

The third and fourth assignments of error are also overruled, and the decree of the court of civil appeals is affirmed.

State v. Cooley.

THE STATE v. GEORGE COOLEY.*

(*Knoxville*. September Term, 1918.)

1. INDICTMENT AND INFORMATION. Charge against individual, Bad check law.

Indictment for violation of Public Acts 1915, chapter 178, the bad check law, held against defendant as an individual, not as president of a grocery company. (*Post*, pp. 36, 37.)

Acts cited and construed: Acts 1915, ch. 178.

2. FALSE PRETENSES. Bad check law, Gravamen of charge, Gravamen of charge that defendant violated Public Acts 1915, chapter 178, the bad check law, is not the issuance of a check, but is the obtaining, with fraudulent intent, of money, or other property, or credit, by means of a check. (*Post*, pp. 37, 38.)**3. STATUTES.** Criminal statute. Construction.

Construction of criminal statute which in many instances would defeat legislative purpose will not be adopted unless forced by express language. (*Post*, p. 38.)

4. FALSE PRETENSES. Bad check law. "Of which he is the maker or drawer."

Defendant violated Public Acts 1915, chapter 178, the bad check law, though he signed check for which he obtained goods as president of grocery company; statutory phrase "of which he is the maker or drawer" merely limiting application to persons obtaining money or property with fraudulent intent by check which they draw personally or in representative capacity. (*Post*, pp. 38-45.)

Acts cited and construed: Acts 1915, ch. 178.

*Authorities passing on the question as to whether mere drawing of check on a bank in which the drawer has no funds or credit and passing the same is false pretenses, are collated in notes in 17 L. R. A. (N. S.), 244; 27 L. R. A. (N. S.), 1032, 52 L. R. A. (N. S.), 919.

State v. Cooley.

purpose, if necessary." *State v. Willis*, 130 Tenn., 408, 409, 170 S. W., 1030.

The purpose of the legislature in enacting the statute now under consideration being to protect the public from fraud accomplished by the use of a check drawn by the person tendering it, the court should hold, as the State insists, that one who draws a check and accomplishes the designated fraud is within the statute, regardless of whether he drew the check on his personal account or in some representative capacity. In each case the fraud, which is the thing legislated against, is the personal act of the person drawing and presenting the check.

The statute is broad enough to cover the act of one who obtains money or property with fraudulent intent by means of a check which he has drawn on an account which is not his personal account but on which he is authorized to draw checks. The fact that such account is in the name of a corporation, and the person drawing the check is an officer of the corporation, should not relieve the latter from criminal responsibility for his fraud in using such a check to obtain money or property. An officer of the corporation should not be allowed to escape the consequences of a criminal act done by him, on the ground that it was an official act, and therefore not his, but the act of the corporation. 8 R. C. L. (Cr. L. section 17), p. 66; 7 R. C. L. Corp. section 485), p. 503.

In Ruling Case Law, vol. 7, p. 503, dealing with the subject of the criminal responsibility of officers for corporate acts, the author says:

"But an officer or agent cannot shield himself from criminal responsibility for his own act on the ground

State v. Cooley.

that it was done in his official capacity as an officer of the corporation, nor can he assert that acts in form corporate were not his acts merely because carried out by him through the instrumentality of a corporation which he controlled and dominated and which he employed for that purpose."

In the case of *Milbrath v. State*, 138 Wis., 354, 120 N. W., 252, 131 Am. St. Rep., 1012, cited by the authors of Ruling Case Law in support of the proposition above quoted, an officer of a corporation was held criminally liable for the misappropriation of funds which had been intrusted to the corporation. His defense that the corporation itself was an independent, responsible personality which intervened between himself as an officer of the corporation and the beneficiary of the trust fund was repudiated by the supreme court of Wisconsin, holding that the legal fiction of the personification of corporations has never been carried to the extent contended for by the accused in that case. In considering the personal liability of the officer of the corporation to the criminal law for the misappropriation done in the name of the corporation, the court said:

"The corporation is in such case a mere instrumentality through and by means of which the natural persons in control . . . carry out their acts." *Milbrath v. State*, 138 Wis., 354, 120 N. W., 252, 131 Am. St. Rep., 1012.

In the same case the court also said:

"In *State ex rel. v. Standard O. Co.*, 49 Ohio St., 137, 30 N. E., 279, 15 L. R. A., 145 [34 Am. St. Rep., 541], it was said that the legal fiction that a corporation is a person can never be urged to an intent and purpose

State v. Cooley.

not within the reason and policy of that fiction. Cases not within the reason and policy of that fiction must necessarily be rare, and no general rule that we are aware of has been in that respect formulated. But it is safe to say that in a criminal prosecution against a person charged with an offense committed by him against the laws of the State he could not be heard to say in justification that he committed that offense in his official capacity as officer of a corporation; nor could he assert that acts in form corporate acts were not his acts merely because carried out by him through the instrumentality of a corporation which he controlled and dominated in all respects and which he employed for that purpose. *Hempfling v. Burr*, 59 Mich., 294, 26 N. W., 496."

In the case at bar, the defendant is charged individually with obtaining money, property, and credit from the prosecutor with fraudulent intent. It is averred in the indictment that the means employed to perpetrate this fraud was a check which he "as president of the Pure Food Grocery Company drew for \$50." It cannot be reasonably contended that, if the Pure Food Grocery Company had been a partnership of which the defendant was a member and whose name he had authority to sign to a check, he would not be the maker or drawer of the check within the contemplation of the provisions of this statute. To hold that the mere fact that the Pure Food Grocery Company was incorporated takes the case out of the statute would be to interpose the legal fiction of the corporation's personality in an instance not within the reason and policy of that fiction. The defendant should not be heard to say in this court that he committed the fraud in his official capacity as an

State v. Cooley.

officer of the corporation, and on that ground escape criminal responsibility for his act.

We are therefore of the opinion that the circuit judge was in error in quashing the indictment in this case, and the judgment of the circuit court is reversed and the cause remanded.

Southern Ry. Co. v. Williams.

SOUTHERN RY. CO. v. C. C. WILLIAMS.*

(Knoxville. September Term, 1918.)

1. JUDGMENT. Full faith and credit. Want of Jurisdiction.

A judgment of a court of another state is not entitled to full faith and credit, under Constitution U. S. article 4, section 1, if void for lack of jurisdiction. (*Post*, pp. 49-54.)

Cases cited and approved: Vorhees v. Bank, 10 Pet., 449; Miller v. White, 76 Am. St. Rep., 805; Earthman v. Jones, 10 Tenn., 484.

Cases cited and distinguished: Paper Co. v. Shyer, 108 Tenn., 453; Pennoyer v. Neff, 95 U. S., 724; Cooper v. Reynolds, 77 U. S. (15 Wall.), 308; Brown v. Brown, 34 Tenn., 432.

Constitution cited and construed: Art. 4, sec. 1

2. GARNISHMENT. Validity. Collateral attack.

In a suit to recover wages, a judgment of garnishment, rendered in another State, may be collaterally attacked, if void. (*Post*, pp. 49-54.)

3. CONSTITUTIONAL LAW. Due process. Attachment.

Where debtor's wages were attached and impounded in another State, and judgment rendered against him, without actual or constructive service in accordance with the laws of that State, the court acquired jurisdiction, and defendant was not denied due process of law, under Constitution U. S. Amendment 14, section 1. (*Post*, pp. 49-54.)

4. COSTS. Allowance. Parties entitled.

Where plaintiff was successful in the justice court, circuit court, and court of civil appeals, and the defendant in the supreme court secured reduction to the amount of liability admitted, held, that the defendant should pay the justice court costs, and the plaintiff the costs of appeal and of circuit court, although the question of legal tender by defendant was doubtful. (*Post*, p. 54.)

*Authorities discussing the question as to garnishment of judgment rendered in another state, are collated in a note in 43 L. R. A. (N. S.), 531.

Southern Ry. Co. v. Williams.

Cases cited and approved: C., N. O. & T. P. Ry. Co., v. Shelton, 123 Tenn., 513.

5. APPEAL AND ERROR. Review. Intermediate courts. Failure to appeal.

Where a question was decided adversely to the defendant in error by the court of civil appeals, he is bound thereby, where he has not brought the case to the supreme court by certiorari. (*Post*, p. 54.)

Cases cited and approved: McKay v. Railroad, 133 Tenn., 595.

FROM CARTER.

Error to the Circuit Court of Carter County.—Hon. DANA HARMON, Judge.

MILLER, SEILER & HUNTER, for appellant.

ALLEN & CLARK, for appellee.

MR. JUSTICE MCKINNEY delivered the opinion of the Court.

The defendant in error, C. C. Williams, sued the plaintiff in error, Southern Railway Company, before a justice of the peace of Carter county, Tenn., and recovered a judgment for \$25.13; same being for wages due him. This judgment was affirmed by the circuit court and by the court of civil appeals.

The railway company admitted that the defendant in error earned that sum as wages, but defended the suit on the ground that \$16.85 of said wages was garnished in its hands, for which judgment was rendered against

Southern Ry. Co. v. Williams.

it as garnishee by a court proceeding in Virginia. The \$25.13, less the amount of the said Virginia judgment, was paid into court as a tender.

Williams was a resident of Tennessee, but worked for the railway company in Virginia with a bridge gang, and his wages were payable in Virginia.

J. B. Denton & Co., a firm engaged in the mercantile business in Bristol, Tenn., though the members of the firm resided in Bristol, Va., instituted a suit before a magistrate in Bristol, Va., to recover an alleged account of \$13.75, which they claimed Williams owed them, and an attachment was prayed on the ground that Williams was a nonresident of that State. This attachment was levied by garnishment on the plaintiff in error, which answered that it was indebted to Williams in the sum of \$25.13. Thereupon judgment was rendered against the railway company for \$16.85, which included \$3.10 costs. The railway company admits that Williams was not summoned by a service of process; that no order of publication was made in said case requiring him to appear; that Williams had no notice of said suit and did not know that his wages had been attached.

The record shows that the proceeding was regular according to the attachment laws of Virginia, and that, according to the Virginia statute, where the debt sued for is less than \$20, it is expressly provided that it is not necessary to give the defendant notice of the suit by summons, publication, or otherwise.

The Virginia judgment being regular, according to the statutes of that State, the railway company insists that it is entitled to full faith and credit in this State,

Southern Ry. Co. v. Williams.

as provided by article 4, section 1, of the United States Constitution.

On the other hand, the defendant in error, Williams, insists that, since there was no personal service of process on him, nor publication made, he was denied his day in court, and invokes article 14, section 1, of the federal Constitution, which provides that no man shall be deprived of his property without due process of law; his contention being that, for the reason stated, the Virginia court was without jurisdiction, that its judgment was void, and that he has a right to attack it collaterally in this proceeding.

If the court were without jurisdiction, then there can be no question but that the defendant in error has a right to question same in this proceeding. This question is fully considered and adjudicated in *Paper Co. v. Shyer*, 108 Tenn. 453. 456, 67 S. W., 856, 58 L. R. A. 173. If the court had jurisdiction, then its judgment is entitled to full faith and credit. If it were without jurisdiction, then its judgment is void.

In *Paper Co. v. Shyer*, supra, 108 Tenn., on page 453, 67 S. W., 858 (58 L. R. A., 173), the court quotes approvingly from *Boswell v. Otis*, (U. S.) 9 How., 348, 13 L. Ed., 164, as follows:

“When the record of a judgment is brought before the court, collaterally or otherwise, it is always proper to inquire whether the court rendering the judgment had jurisdiction. Jurisdiction is acquired in one of two ways: First, as against the person of the defendant, by service of process; or, secondly, by a procedure against the property of the defendant, within the jurisdiction of

Southern Ry. Co. v. Williams.

the court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question; and it is immaterial whether the proceeding against the property be by attachment or bill in chancery."

It is patent, therefore, that the court did not acquire jurisdiction against the person of the defendant by a service of process. Then did it acquire jurisdiction by a procedure against the property of the defendant within the jurisdiction of the court?

Under the authority of *Paper Co. v. Shyer*, supra, which is supported by practically all the modern authorities, there can be no question but what the proceeding in the Virginia court would have been valid, had there been a constructive notice by publication. The property was within the jurisdiction of the court, and was impounded by attachment, as provided by the Virginia statute. The statute was strictly followed, but it did not provide for notice by publication. Was the court without jurisdiction, because no publication was provided for and made? In other words, what is it that gives the court jurisdiction in such a case? Is it the publication, or the seizing of the property by attachment, or does it take both the publication and the seizing of the property to confer jurisdiction upon the court?

All of the authorities, including *Paper Co. v. Shyer*, supra, hold that the publication alone does not confer jurisdiction. They also hold that the attachment and the publication combined only confer jurisdiction to the extent of the value of the property impounded. It therefore follows that the one thing that confers jurisdiction upon the court is the seizing of the property,

Southern Ry. Co. v. Williams.

and hence publication is not necessary to make the statute valid. Where the statute provides for publication, it, of course, should be made. But even if it provides for publication, and publication is not made, the judgment cannot be collaterally attacked. The seizure of the property is the notice required by the due process clause, and this is based upon the idea that "The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale." *Pennoyer v. Neff*, 85 U. S., 724, 24 L. Ed., 570.

A case directly in point is *Cooper v. Reynolds*, 77 U. S. (10 Wall.), 308, 19 L. Ed., 931. This was a proceeding had in Tennessee, in which the property of a nonresident was attached. The affidavit upon which the attachment was issued was defective, and there was no publication of notice as required by the Tennessee statute. It was held that the court had jurisdiction, and that the judgment could not be collaterally attacked on account of the defective affidavit, and because no publication had been made. The court, speaking through Mr. Justice MILLER (77 U. S. [10 Wall.], on page 319, 19 L. Ed., on page 933), says:

"Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem*. Without this, the

Southern Ry. Co. v. Williams.

court can proceed no further; with it the court can proceed to subject that property to the demand of plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when such a writ is returned into court, the power of the court over the *res* is established. The affidavit is the preliminary to issuing the writ. It may be a defective affidavit, or possibly the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities; but, the writ being issued and levied, the affidavit has served its purpose, and, though a revisory court might see in some such departure from the strict direction of the statute sufficient error to reverse the judgment, we are unable to see how that can deprive the court of the jurisdiction acquired by the writ levied upon defendant's property.

"So, also, of the publication of notice. It is the duty of the court to order such publication, and to see that it has been properly made, and, undoubtedly, if there has been no such publication, a court of errors might reverse the judgment.

"But when the writ has been issued, the property seized, and that property been condemned and sold, we cannot hold that the court had no jurisdiction for want of a sufficient publication of notice."

This case is approved in *Pennoyer v. Neff*, supra.

In *Voorhees v. Bank*, 10 Pet., 449, L. Ed., 490, the defendant held land under attachment proceedings against a nonresident, who had never been served with process or appeared in the case. No affidavit was pro-

Southern Ry. Co. v. Williams.

duced, nor publication of notice, nor appraisement of the property; but it was condemned and sold without waiting twelve months from the return of the writ, and without calling him at three different terms of the court, all of which are specially required by the act regulating the proceedings in Ohio, where they were had. This court held that there was sufficient evidence of jurisdiction in the court which rendered the judgment notwithstanding the defects we have mentioned, and that they were not fatal in a collateral proceeding.

In the monographic note to *Miller v. White*, 76 Am. St. Rep., 805, many authorities are cited in support of this holding.

This doctrine seems to have been recognized by this court in the case of *Paper Co. v. Shyer*, supra. The court (108 Tenn. on page 452, 67 S. W., 858 [58 L. R. A., 173]), in speaking of the property attached, says:

"It stands in his place before the court just as it stands for his debt, to the extent of its selling value, and no further; that the property's representation of its owner can be no larger or greater than itself, and is measured by its own pecuniary capacity; that its symbolical or legal presence affords him his day in court to that extent, and for the purposes of the appropriation of the property, but not otherwise."

And in *Brown v. Brown*, 2 Sneed, 432, the court says:

"But the process of attachment, authorized by law, may be the foundation of a judgment, deemed valid in the State where it is rendered, and, being a proceeding *in rem*, its effect is to subject the property attached to a judicial sale for the satisfaction of the plaintiff's demand."

Southern Ry. Co. v. Williams.

The case of *Earthman v. Jones*, 2 Yerg., 484, relied upon by the defendant in error, is a well-considered case, but not at all in point.

The court of civil appeals and the circuit court rendered a judgment in favor of the defendant in error for the full amount sued for, and declined to allow the plaintiff in error credit for the \$16.85, which it had to pay out on account of the Virginia judgment, and in this they were in error, and their judgment will be modified to the extent of allowing the plaintiff in error credit for said sum of \$16.85.

The question of a legal tender is doubtful. However, the agreed statement of facts shown that the plaintiff in error admitted a liability of \$8.28, which we have adjudged to be all that defendant in error is entitled to recover in this case. This being true, we think the defendant in error should pay the costs of the appeal, and the costs of the circuit court. *C., N. O. & T. P. Ry. Co. v. John Shelton*, 123 Tenn., 513, 130 S. W., 843.

The plaintiff in error will pay the costs accrued in the justice of the peace court. A judgment may be entered in accordance with this opinion.

The defendant in error insists that the bill of exceptions and the appeal bond were not filed within the time provided by the judgment entered in this case in the circuit court, and for that reason the appeal of the plaintiff in error should be dismissed.

This question was decided adversely to the defendant in error by the court of civil appeals, and he has not brought the case to this court by a writ of *certiorari*, and is therefore bound by the decree in the court of civil appeals, and this question is not before us, and cannot be considered by us. *McKay v. Railroad*, 133 Tenn., 595, 182 S. W., 874.

Kenner & Co. v. Peters.

KENNER & CO. v. LOUIS PETERS.

(Knoxville. September Term, 1918.)

SALES. Contracts. Retention of Title. Necessity of Writing. Statutes.
A note stating consideration as "one Chalmers 6 Cyl. car," and "it is further agreed that the title of said —— shall remain in seller," being insufficient to identify the property without resort to parol evidence, does not comply with Acts 1899, chapter 15, requiring sales contracts retaining title to be in writing.

Acts cited and construed: Acts 1899, ch. 15.

Cases cited and approved: Southern Ice & Coal Co. v. Alley, 127 Tenn., 173; Nance v. Piano Co., 128 Tenn., 1; McDonald Auto. Co. v. Bicknell, 129 Tenn., 493; Shaw v. Webb, 131 Tenn., 173.

Cases cited and distinguished: Manufacturing Co. v. Nordeman, 118 Tenn., 384.

FROM SULLIVAN.

Appeal from the Chancery Court of Sullivan County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—HON. HAL H. HAYNES, Chancellor.

PHILLIPS & TESTERMAN, for appellant.

J. L. WATTS and ST. JOHN & GORE, for appellee.

Kenner & Co. v. Peters.

MR. COX, Special Justice, delivered the opinion of the Court.

This is a suit against Peters, the sub-vendee of an automobile, for the collection of the balance due upon certain promissory notes executed by the original vendee, as a part of the purchase price. Peters is sued as upon conversion; the contention being that, in the deferred purchase-money notes, title was retained to the car to secure the amount of said notes. The car was a six-cylinder Chalmers, sold by complainants to one George Brown on April 12, 1916. Brown made a cash payment and executed his three promissory notes for the balance; one note being for \$378, due on or before June 12, 1916, one for \$378, due on or before July 12, 1916, and the third note being for \$665, due on or before October 12, 1916, all of which notes provided for interest from date, and each recited that the failure to pay any one of the notes should operate to make all of them due and payable.

Brown sold the car to the defendant, Peters, without having paid the notes or any part of same. It is alleged in the bill that the supposed sale was but a fraudulent scheme; that Peters and Brown were in fact partners, and that the sale was colorably entered into, the car having been removed by Peters to the State of Virginia immediately after its purchase by him; that it was understood between the complainants and said Brown, when the car was sold to the latter, that the same should not be removed from the State of Tennessee. It is also alleged, as another evidence of the fraud, that the amount which Peters paid for the automobile was grossly inadequate to the true value of same.

Kenner & Co. v. Peters.

Peters answered the bill, stating that he was, at the time of the filing of the bill and the answer, a resident of Hopewell, Va.; that he knew and knows nothing concerning the sale by complainants to Brown or the agreement that the car should not be taken from the State of Tennessee; that he purchased the car on May 6, 1916, and paid \$500 therefor by the assumption of certain debts of Brown and payment of certain cash; and that he used the car for a while at Hopewell, Va., and then sold it for \$440. He denies the fraud, and states that he only knew Brown for a short time before the purchase of the car from him, and that the sale took place in the State of Virginia, and the defense is relied upon that the laws of Virginia should govern the rights of the parties, which requires the registration of title retention notes as against third parties. By amendment to the original bill, the complainants charge that the purchase by Peters of the automobile in Virginia was a part of the fraudulent scheme between Brown and Peters.

The notes in question were produced and filed, and the testimony of witnesses taken upon the issues thus raised by the parties. The contention was made by Peters that the notes do not constitute a sufficient description or identification of the car in order to show that the title was retained to same. By admission, two of the notes have been eliminated, complainants now claiming that the second note mentioned above, for \$378, is the only one which they rely upon as retaining the title to the automobile, and they seek judgment against Peters on this note, as for a conversion of the automobile, having attached in this cause certain real

Kenner & Co. v. Peters.

estate belonging to defendant, Peters, at Kingsport, Tenn. The note in question is as follows:
"378.00 Rogersville, Tenn., April 12, 1916.

"On or before the 12th day of June, 1916, we the undersigned, of Sullivan county, State of Tennessee, for value received in one six-cylinder Chalmers car, promise to pay to the order of Kenner & Company, of Rogersville, Tennessee, three hundred seventy-eight dollars, with interest at the rate of six per cent per annum from date until paid. We agree that if this note is placed in the hands of an attorney at law for collection, or has to be sued on, that —— will pay ten per cent. attorney's fees in addition to the principal, which fee shall be added to and become a part of the principal. This is the —— of a series of —— notes for one Chalmers 6 Cyl. car, and it is understood and agreed, if any of said notes remain unpaid for thirty days from maturity, all of said series of notes shall at the option of the said Kenner & Company become due and payable immediately. It is further agreed that the title of said —— shall remain in said Kenner & Company until all of said series of notes shall have been paid. It is also further understood and agreed that the makers and indorsers of this note hereby waive demand and protest, and notice of demand and protest, and in case of the insolvency of the makers of this note, or series, or either of them, then this note, or series of notes, shall become due and payable immediately.

"Negotiable and payable at the Citizens' Bank of Rogersville, Tenn.

GEORGE BROWN,
"JAMES BARRANT."

Kenner & Co. v. Peters.

Neither Brown nor his surety, or comaker, Barrant, are parties to the suit, nor is the possession of the automobile sought. It is not known where the latter is. The only difference between this note and the other two is that, where the words "one Chalmers 6 Cyl. car" appear therein, as being the property for which the series of notes are executed, they do not appear in the other two notes. In one of the other notes the space is left blank, and in the other the property is designated as "one six-cylinder car." In all of the notes, the sentence purporting to retain title does not have the blank space filled in, showing what article it is in which title is so retained. Barrant signed the note as security for the payment of same.

The chancellor held that:

"No such retention of title was shown for lack of description of the automobile, and because the clause in the notes, which it is insisted, constitute said required written agreement, was left blank, as regards the thing to which title was intended to be retained. To make the writing conform to law, it should give some description capable of directly identifying the article so conditionally sold; it must refer to it in such way as to enable one making reasonable inquiry to follow up and make its identification certain. Less than this would not be retention of title in writing, but it would be in parol, or at least a material part thereof would not be written."

The court of civil appeals reversed the decree of the chancellor, holding that the essential requirements of Acts 1899, chapter 15, forbidding the making of such contracts by parol, "was fully met by the incorporation

Kenner & Co. v. Peters.

of the language which is used to the effect that the title should remain in Kenner & Co. until the notes had been paid," citing *Manufacturing Co. v. Nordeman*, 118 Tenn., 384, 100 S. W., 93, and *Harrison v. Weinstein*, 3 Tenn. Civ. App., 217, and granted the complainants the relief sought against the defendant Peters upon the theory of conversion.

By *certiorari* and *supersedeas*, Peters has brought the case here for a review of the decree of the court of civil appeals.

We think the latter decree is erroneous, and that the decree of the chancellor is the correct one, upon the question of the sufficiency of the title retention note as such. It will therefore not be necessary to consider the other questions raised in the case.

There is nothing contained in *Mfg. Co. v. Nordeman*, supra, to support the holding of the court of civil appeals. In that case the sole and only question presented was:

"Whether there can be a lawful conditional sale to a retail merchant of goods to be resold in and for the purposes of, and in prosecution of, his business; that is to say, can there be a lawful retention of title under such a state of facts, or is this inconsistent with the nature of a sale made under the circumstances stated?"

It was held that there could not be. No question as to sufficiency of description or sufficiency of memorandum or writing was involved in that case.

The following statement was made in that case, with reference to the decision under the facts there before the court, and concerning the danger of going too far along the line of liberality of construction in favor of

Kenner & Co. v. Peters.

such securities, and we think it should be repeated and reiterated here, viz.

"It is certainly in line with our own previous decisions, and with the disinclination of this court to extend the law of conditional sales further than has already been done, since they are essentially out of harmony with the policy which underlies our registration laws."

In the case of *Harrison v. Weinstein Bros.*, supra, the note in question was executed in payment for a diamond ring in which it is stated that the vendor is to "retain lien on said ring until same is fully paid for." The main question involved in that case was whether or not the use of the word "lien" was equivalent to the words "retention of title." The court of civil appeals held that it was, upon the idea that the purpose and effect of these title retention notes is security for the payment of the debt. This is in line with the decisions of this court. The retention of the title in these notes is merely a means of security, and the vendor has only a lien upon the property. See *Southern Ice & Coal Co. v. Allen*, 127 Tenn., 173, 154 S. W., 536; *Nance v. Piano Co.*, 128 Tenn., 1, 7, 155 S. W., 1172, Ann. Cas., 1914D, 834; *McDonald Auto. Co. v. Bicknell*, 129 Tenn. 493, 167 S. W., 108, Ann. Cas., 1916A, 265; *Shaw v. Webb*, 131 Tenn., 173, 174 S. W., 273, L. R. A., 1915D, 1141, Ann. Cas., 1916A, 626.

In the *Harrison v. Weinstein Case* the question of description was also considered. We do not think it necessary to refer to this question in the case under consideration further than to say that we do not feel that the Weinstein Case should be extended in its application and that it should be confined to its own particular facts. We think the note involved in the case before us is insufficient for another reason: The provi-

Kenner & Co. v. Peters.

sion or the act of 1899, to the effect that these conditional sales contracts retaining title shall be in writing, is analogous to the statute of frauds, and should be strictly enforced and adhered to in this respect. It is conceded in the brief of complainants that this statute in this respect is akin to the statute of frauds. We think that, if the contract is, in any particular, in parol, that it is entirely in parol. The sentence in the note in question here, relating to the retention of title, is:

"It is further agreed that the title of said —— shall remain in said Kenner & Company until all of said series of notes shall have been paid."

To hold as complainants contend, that this is a retention of title to the automobile in question it would be necessary to impart into the written note or memorandum something which is not there. Complainants insist that the intention of the parties can be arrived at from the whole instrument, and that this intention is that title to the six-cylinder Chalmers car was retained by Kenner & Co. "until all of said series of notes shall have been paid." We do not think such intention can be *definitely* and *certainly* arrived at from the instrument itself without the aid of parol testimony. It would of necessity have to be as to an understanding or agreement in parol, should it be construed to relate to the automobile in question. The intention of the parties cannot be otherwise arrived at from this instrument, except by conjecture; and one conjecture may be as correct as another. For instance, would it not be as reasonable for us to presume that it was *not* the intention that title be retained in the car, and that the space was not filled in by description of the car, for the reason that Brown furnished Barrant as his surety, and

Kenner & Co. v. Peters.

that Kenner & Co. were satisfied with such security, in lieu of retention of title to the automobile? In either event, it becomes necessary that the matter be set up in parol. We cannot arrive at what the real agreement of the parties was at the time the notes were executed, from this instrument, without the consideration of parol testimony. This renders the instrument one in parol, and therefore not in compliance with the act of 1899, requiring such instruments to be in writing. The statute provides that "such retention of title" shall be illegal and invalid, unless "*evidenced*" by the written contract or memorandum, executed at the time of the sale." The "retention of title" is not "*evidenced*" by the note in question. It is the very thing which is left blank, and in order to obtain "*evidence*" of it parol testimony must be resorted to. By analogy to the statute of frauds, we think this renders it entirely in parol and not a compliance with the statute. We think to hold otherwise in this case would be fruitful of much mischief, and that there would be no limitation or border line in determining as to when the requirements of the act regarding such contracts had been met. The ultimate result would be the abrogation of the statute by judicial legislation and the defeat of the legislative intent as expressed by the act in question.

No one knows where Brown, the original vendee, is. He is not a party to the suit, and his deposition was not taken. The same is true as to Barratt, the surety of Brown upon the note.

For the reasons herein stated, the decree of the court of civil appeals is reversed, and the decree of the chancellor affirmed. Kenner & Co. will pay all costs of the cause.

Harmon v. Harmon.

W. E. HARMON v. J. M. HARMON.

(Knoxville. September Term, 1918.)

1. INSANE PERSONS. Right to appeal. Inquisition.

A defendant, against whom there has been a judgment of lunacy in an inquisition held for that purpose, is entitled to appeal.
(Post, p. 66.)

Cases cited and approved: Shaller v. Garrett, 127 Tenn., 665; Cooper v. Summers, 33 Tenn., 453; Fentress v. Fentress, 54 Tenn., 428; Davis v. Norvell, 87 Tenn., 36.

Code cited and construed: Sec. 5451 (T.-S.)

2. APPEAL AND ERROR. Right to appeal. Inquisition. "Person interested." Aggrieved person.

A brother of a thirty-seven year old bachelor was not, by reason of his contingent expectancy of inheritance, a "person interested," nor an "aggrieved person," who could, under Thompson's Shannon's Code, sections 4879, 4880, appeal from a judgment after an inquisition finding that his brother was not of unsound mind.
(Post, pp. 66-69.)

Cases cited and approved: Glosson v. Glosson, 104 Tenn., 391; Porter v. Burton, 57 Tenn., 584; Brooks v. Fleming, 65 Tenn., 331; Goldman v. Justice, 40 Tenn., 107; Studebaker v. Markley, 7 Ind., App., 368; McKenna v. McKenna, 29 R. I., 224; Briard v. Goodale, 86 Me., 100; Tierney v. Tierney, 81 Neb., 193.

Cases cited and distinguished: In re Carpenter, 140 Wis., 572; Nimblet v. Chaffee, 24 Vt., 628.

Codes cited and construed: Secs. 4879, 4880 (T.-S.)

FROM CLAIBORNE.

Harmon v. Harmon.

Appeal from the County Court of Claiborne County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—Hon. J. H. S. MORRISON, Judge.

MONTGOMERY, DONALDSON & MONTGOMERY, for W. E. Harmon.

Wm. I. Davis, for J. M. Harmon.

JOHN P. DAVIS, for intervening petitioner, T. T. Simmons.

MR. JUSTICE GREEN delivered the opinion of the Court.

This is a proceeding instituted in the county court of Claiborne county to have J. M. Harmon, declared a person of unsound mind and a guardian appointed for his estate. The petitioner, W. E. Harmon, is a brother of the defendant, and the proceedings were had under the sections of the Code carried into Thompson's-Shannon's compilation as section 5451 *et seq.*

The jury reported that defendant was a person of unsound mind. The county judge, however, upon consideration of the evidence, came to a different conclusion and dismissed the petition. From this judgment petitioner prayed an appeal to this court. The case then properly went to the court of civil appeals. *Shallier v. Garrett*, 127 Tenn., 665, 156 S. W., 1084.

The court of civil appeals considered the matter as though before it on a broad appeal in equity (whether properly or not), and found that J. M. Harmon was a

Harmon v. Harmon.

person of unsound mind, reversed the judgment of the county court, and remanded the case to the latter court for the appointment of a guardian and further proceedings.

J. M. Harmon has brought the case to this court by *certiorari*, and first insists that the court of civil appeals was without jurisdiction to entertain this appeal of defendant's brother, the petitioner below. We think this contention must be sustained.

It is well settled that a defendant, against whom there has been a judgment of lunacy in an inquisition held for that purpose, is entitled to appeal. *Cooper v. Summers*, 1 Sneed (33 Tenn.), 453; *Fentress v. Fentress*, 7 Heisk. (54 Tenn.), 428; *Davis v. Norvell*, 87 Tenn., 36, 9 S. W. 193. A different question arises, however, when an unsuccessful petitioner attempts to appeal.

The following sections of the Code control the right of appeal in cases like this:

"Any person dissatisfied with the sentence, judgment, or decree of the county court, may pray an appeal to the circuit court of the county, unless it is otherwise expressly provided by this Code." Thompson's-Shannon's Code, section 4879.

"In all cases in which the jurisdiction of the county court is concurrent with the circuit or chancery courts, or in which both parties consent, the appeal lies direct to the supreme court." Thompson's-Shannon's Code, section 4880.

The jurisdiction of the county court is concurrent with that of the chancery court where the estate of the lunatic exceeds \$500, which is true in this case.

Harmon v. Harmon.

While the code section above quoted provides for an appeal by "any person dissatisfied," this does not mean that one without an interest in the subject-matter, and one not aggrieved or prejudiced by the decree, is entitled to an appeal. Other statutes relating to appeals are likewise somewhat broad in their language, but this court has always construed them as confining the right of appeal to persons interested, or persons aggrieved. *Glossom v. Glossom*, 104 Tenn., 391, 58 S. W., 121; *Porter v. Burton*, 10 Heisk. (57 Tenn.), 584; *Brooks v. Fleming*, 6 Baxt. (65 Tenn.), 331; *Goldman v. Justice* 3 Head (40 Tenn.), 107.

We are unable to say that the petitioner herein has any legal interest in the controversy. Defendant is an unmarried man about thirty-seven years of age. The petitioner is his brother. Petitioner is under no obligation to support or care for the defendant, nor is the defendant under any such obligation to the petitioner. It can make no difference to petitioner, so far as his legal rights are concerned, if the defendant dissipates his entire estate. The only interest that petitioner can have in the estate of defendant is that of an heir expectant. Such an interest is a mere contingency, subject to be defeated by the act of petitioner, and is not an interest sufficient to justify any interference by the petitioner with the estate of the defendant.

The supreme court of Wisconsin, in a case where a sister of an alleged incompetent person, whose petition for the appointment of a guardian was denied, and who appealed to that court, said:

"Obviously no personal rights of appellant are involved, for an adult nonresident sister has no legal

Harmon v. Harmon

right to control the custody or conduct of another adult sister residing here, nor any right to support from, or legal duty of care or support to, the latter. It is equally obvious that no legal rights of appellant in or to property are affected. Even a next of kin or heir apparent has no right or legal interest in the property of a living relative. *Nemo est hæres viventis.* . . . By reason of the absolute right of disposal of property by the owner, any expectancy or chance of inheritance is too conjectural and remote to be recognized as a legal right. . . . So that the appellant is not a party aggrieved, as the term in section 4031 is ordinarily construed." *In re Carpenter*, 140 Wis., 572, 123 N. W., 144, 25 L. R. A. (N. S.), 155.

In a similar case the supreme court of Vermont made the following observation:

"We think there is sound reason in this distinction. The friends and relatives in one case, and the guardian in the other, have no such interest as is ordinarily required to entitle one to appeal from a decree of the probate court. They have no present vested pecuniary interest in creating or continuing the guardianship; and no interest or right of theirs is concluded by the decree. A new proceeding may be instituted at any time, when it is believed the evidence of the insanity has become more convincing. And the friends who deem the relative insane, when others do not, as is not seldom the case, where property is in expectancy, should be satisfied with the decision of the probate court, and ordinarily will be; and, at all events, to allow an appeal, and protracted litigation, at the caprice of any one of the applicants, however numerous, and of the guardian

Harmon v. Harmon.

also, would become absolutely intolerable to one accused of insanity, and not unlikely to produce such a state of mind. It is said the court ought not to presume against the interest of the appellant. But it is to be borne in mind that the expectancy of an heir, or the apprehension of being ultimately compelled to maintain a lineal ancestor or descendant, is no present vested interest, which the law can recognize." *Nimblet v. Chaffee*, 24 Vt., 628.

To the same effect, see *Studabaker v. Markley*, 7 Ind. App., 368, 34 N. E., 606; *McKenna v. McKenna*, 29 R. I., 224, 69 Atl., 844; *Briard v. Goodale*, 86 Me., 100, 29 Atl., 946, 41 Am. St. Rep., 526; and other cases collected in notes, 25 L. R. A. (N. S.), 155, and 15 L. R. A. (N. S.), 436.

The court of civil appeals entertained this appeal on the authority of *Tierney v. Tierney*, 81 Neb., 193 115 N. W., 764, 15 L. R. A. (N. S.), 436. The appellants in that case were the children of the alleged incompetent and dependent upon him for a support, and were therefore much more interested in the preservation of his estate than is the appellant here. While there are broad statements in the opinion with reference to rights of heirs apparent or presumptive, we are of opinion that the result reached in the cases heretofore cited by us is more in accord with the sound principles and proper construction of our statutes.

The judgment of the court of civil appeals is accordingly reversed, and this appeal dismissed, at the cost of appellant.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
NASHVILLE, DECEMBER TERM, 1918.

JAMES A. YOWELL *et al.* v. UNION CENTRAL LIFE INS. CO.
et al.

(Nashville. December Term, 1918.)

1. INSURANCE. Agents. Construction of contract. Surrounding circumstances.

The chancellor in construing a contract between an insurance company and its agent should look to the relation of the parties, the object to be accomplished, and the general circumstances attending its execution, to determine whether the agent was entitled to renewal commissions after the termination of the contract. (*Post*, pp. 74-88.)

Cases cited and approved: Lewis v. Atlas Mutual Life Ins. Co., 61 Mo., 534; Wells v. National Life Association, 39 C. C. A., 476; Stowell v. Greenwich Ins. Co., 20 App. Div., 188; Stamper v. Venable, 117 Tenn., 557; McKay R. R. Co., 133 Tenn., 590; Perkins Oil Co. v. Eberhart, 107 Tenn., 409; Hardwick v. Can Co., 133 Tenn., 657;

2. INSURANCE. Contract of Agency. Renewal commissions.

Under a contract between an insurance company and an agent, held, that the parties meant to confine renewal commissions under former contracts to the continuance of the present contract. (*Post*, p. 88.)

3. INSURANCE. Contract of agency. Construction.

Where a representative of an insurance company draws up a contract of agency, the contract, in cases of doubt, will be construed most strongly against the company. (*Post*, pp. 89, 90.)

Yowell v. Life Ins. Co.

Case cited and approved: Perkins Oil Co. v. Eberhart, 107 Tenn., 409.

4. CONTRACTS. Construction. Practical interpretation.

The rule concerning practical interpretation of the parties themselves only applies in cases where contract is ambiguous and intention doubtful, and even then it ought to appear with reasonable certainty that acts alleged to have been performed in the construction of the contract were voluntary acts of both parties, performed with knowledge of the terms of the contract and in view of a purpose at least consistent with that to which they are sought to be applied. (*Post*, pp. 90, 91.)

Cases cited and approved: State ex rel. v. Vanderbilt University, 129 Tenn., 279; Topliff v. Topliff, 122 U. S., 121; Sternbergh v. Brock, 225 Pa. 279.

Case cited and distinguished: Chicago v. Sheldon, 9 Wall., 50.

5. INSURANCE. Contract of agency. Practical construction by parties.

Mere fact that general agent of insurance company continue to pay renewal commissions to a subagent, who had terminated his contract, did not show a practical construction to effect that subagent was entitled to renewal commissions; it not being shown when company first received notice of cancellation of contract. (*Post*, pp. 91, 92.)

Cases cited and approved: Cerny v. Paxton & Gallagher Co., 78 Neb., 134.

6. PAYMENT. Recovery. Burden of proof.

To recover money paid though mistake of fact, burden is on plaintiff to show that payments were in fact made under a mistake of fact. (*Post*, pp. 92-94.)

Case cited and approved: Dolvin v. American Harrow Co., 125 Ga., 699.

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.
—HON. JOHN ALLISON, Chancellor.

Yowell v. Life Ins. Co.

DOUGLAS & NOWEL, for appellants.

THOS. J. TYNE, for appellees.

MR. MALONE, Special Justice, delivered the opinion of the Court.

This case turns upon the construction of a contract between insurance agents and the company.

The contract in question, dated July 1, 1912, was made between James A. Yowell and his son, Joel E. Yowell, as subagents, the firm of Dabney & Martin, as general agents, and the Union Central Life Insurance Company. It was the last of several agency contracts to which the complainants, James A. and Joel E. Yowell, and the defendant, Union Central Life Insurance Company, were parties.

The Yowells filed the original bill against both of the other parties to the contract: Against Dabney & Martin on the theory that under a proper construction of the contract they were bound to pay certain renewal commissions under former contracts estimated at about \$6,000; against the Union Central Life Insurance Company upon the theory that it prevented its general agents, Dabney & Martin, from carrying out their contract.

The complainants contend that the future renewal commissions, or their value, are proximately ascertainable by the calculations of actuaries, citing Sedgwick on Damages (9th Ed.), section 834e; *Lewis v. Atlas Mutual Life Insurance Co.*, 61 Mo., 534; *Wells v. National Life Association*, 39 C. C. A., 476, 99 Fed., 222, 53 L. R. A., 33; *Stowell v. Greenwich Ins. Co.*, 20 App. Div., 188, 46 N. Y. Supp., 802.

Yowell v. Life Ins. Co.

But in the view which we take of this case, it is not necessary to pass upon this insistence.

It is further contended for the complainants:

(1) That under a proper construction of the contract they are entitled to the value of these renewal commissions.

(2) That the contract has been so construed by the parties, and certain renewal commissions actually paid; and that the defendants are bound by this practical construction.

The defendants insist:

(1) That the contract is plain and unambiguous, and that by its terms the Yowells are not entitled to these renewals.

(2) That the renewal commissions actually paid were paid by mistake, and the answer is filed as a cross-bill to recover the same.

(3) That the Yowells entered into the contract with the deliberate intention of not performing, and that this was a fraud on their part which precludes them from obtaining a decree.

The chancellor was of the opinion that the contract on its face was free from ambiguity, and that under its terms the Yowells were not entitled to these renewal commissions. He declined to consider the evidence offered to prove the circumstances preceding and attending the execution of the contract, the previous relations of the parties, etc.

A decree was accordingly entered dismissing the bill, and allowing a recovery under the cross-bill for the renewal commissions actually paid.

Yowell v. Life Ins. Co.

From this decree the present appeal is prosecuted by the complainants.

First. In deciding whether the chancellor correctly construed the contract, we think it proper to look to the relation of the parties, the object to be accomplished, and the general circumstances attending its execution. The chancellor should have done this. *Stamper v. Venable*, 117 Tenn., 557, 97 S. W., 812; *McKay v. R. R. Co.*, 133 Tenn., 590, 182 S. W., 874; *Perkins Oil Co. v. Eberhart*, 107 Tenn., 409, 64 S. W., 760; *Hardwick v. Can Co.*, 113 Tenn., 657, 670, 88 S. W., 797.

As stated by Chief Justice NEIL in the case last cited: "It is the duty of the court . . . to ascertain, if it can, the meaning which the contract bore in the minds of the parties, and to enforce that meaning or intention. For the purpose of discovering this intention, we must view the situation of the parties and their surroundings so as to place ourselves in the position which they occupied, and thus be able to see the things spoken of in the contract as they saw them."

The rather voluminous record discloses these facts: For many years preceding the execution of this contract, the defendant Union Central Life Insurance Company had maintained two general agencies in the State of Tennessee, instead of one, as was customary. One of these offices was under the direction of complainant James A. Yowell; the other under the direction of a Mr. Martin. Each of these general agents took in his son as a partner.

There was jealousy and friction between these two offices, and the condition was unsatisfactory to the company.

Yowell v. Life Ins. Co.

Mr. James A. Yowell had been with the company many years, and it is not denied that he was highly successful in getting business for the company. It appears that from 1897 to 1908 he wrote annually from \$225,000 to \$475,000 of insurance.

In 1903 he took in as a partner his son, the complainant Joel E. Yowell, and under date of August 1, 1903, a new contract was made between the company and the Yowells.

On May 16, 1908, another contract was entered into between the Yowells and the defendant, Union Central Life Insurance Company, by which the size of the commissions allowed under the former contract was materially reduced; this being done at the company's request in view of certain adverse legislation.

In 1909 the complainant Joel E. Yowell retired from the firm of Yowell & Yowell, and his father formed a partnership with the defendant C. C. Dabney. Thereupon a new contract, dated March 15, 1909, was made between the company and the firm of Yowell & Dabney. Under this contract the new firm worked for the next three years, during which time Dabney proved himself a very efficient agent for the company.

In the latter part of 1911, Mr. Martin, the other general agent, died, and was succeeded by his son, and surviving partner, the defendant J. B. Martin.

In March and April, 1912, an effort was made to arrange a definite division of the State between Yowell & Dabney and J. B. Martin; and a Mr. Hommeyer, assistant superintendent of agencies, was sent by the company to Nashville to assist in the contemplated division.

Yowell v. Life Ins. Co.

About June 12, 1912, Mr. Hommeyer again came to Nashville with the idea of completing this arrangement, but was unsuccessful; Mr. Yowell refusing to go on with it.

The question then arose as to Dabney buying out Yowell's interest in the partnership; the officials of the company apparently having the idea that Dabney would prove more tractable than Yowell, and that a consolidation of the rival agencies could be arranged between him and Martin, if Mr. Yowell should be eliminated. Nothing was said to Yowell of the proposed consolidation.

Through the efforts of Mr. Hommeyer, a give or take proposition of \$10,000 was submitted to Mr. Yowell, and he elected to sell to Dabney.

A written contract was accordingly entered into on June 14, 1912, by the terms of which Dabney purchased Yowell's interest under the contract of March 15, 1909, with certain reservations not necessary to mention. He did not sell his rights under former contracts.

On the same afternoon (and really as part of the same transaction), a written agreement was made between complainant James A. Yowell and Hommeyer, acting on behalf of the company, by the terms of which, in consideration of the sale to Dabney and the surrender of the contract of Yowell & Dabney, it was agreed to draft a new ten-year contract with Mr. Yowell.

The two significant features of this proposed contract were:

(1) That Mr. Yowell should have a "direct contract" with the company; i. e., he would not hold by sub-

Yowell v. Life Ins. Co.

contract with the general agent, but would contract with the company itself.

(2) That he should have a "vested right" in his renewals; by which it was meant that Yowell would secure his renewal commissions under any circumstances, even though he might voluntarily leave the service of the company.

This agreement was made "subject to the approval of the company."

After these papers were executed, Mr. Yowell was for the first time informed that Dabney & Martin had consolidated and that this new firm was to be made general agent for the whole State.

It seems evident that Mr. Yowell would not have sold out if he had known of the proposed consolidation of the two agencies, and it is to be inferred that the proposed new ten-year contract with its features of "direct contract" and "vested renewals" was used by the company's representative in the nature of a bait to induce him to sell.

However this may be, the company, after the consolidation was accomplished, wrote Mr. Yowell under date of June 19, 1912, that the arrangement contemplated in Hommeyer's agreement would not be approved. In short, the company refused to give him either the "direct contract" or the "vested renewals."

Under all these circumstances, Hommeyer, on June 21, 1912, again came to Nashville, and on that day the contract now in question was drafted.

It is not disputed that the contract was drawn on a printed form of the company; the blanks being filled in

Yowell v. Life Ins. Co.

typewriting, and there being certain typewritten addenda as hereinafter shown. It is further agreed on all sides that Mr. Hommeyer dictated the typewritten portions of the agreement.

The contract recites that it is made on July 1, 1912, between "Dabney & Martin, Managers," party of the first part, and Yowell & Yowell, party of the second part, and the Union Central Life Insurance Company, party of the third part.

The term is for ten years, and the territory is:

"Davidson county, in the State of Tennessee, not exclusive, and such privilege in other territory as may be agreed upon."

Like previous contracts between the company and the Yowells, it is divided into fifteen printed sections or headings, entitled respectively: "(1) Appointment," "(2) Term," "(3) Territory," "(4) Commissions," "(5) Supplies," "(6) Readjustment," "(7) Relations," "(8) Bond," "(9) Service," "(10) Reports," "(11) Collections," "(12) Cancelled policies," "(13) Records," "(14) Authority," "(15) Termination," and a typewritten section, "No. 16 Office."

This contract differs from previous ones to which the Yowells were parties, in that it is a contract for a sub-agent, and not a general agents' contract. The language used is, however, in many respects the same as that of the previous contracts.

The controversy arises especially over the printed sections, No. 4, entitled "Commissions," and No. 7, entitled "Relations," together with the typewritten addenda thereto.

Yowell v. Life Ins. Co.

Printed section No. 4, reads, in part, as follows:

"4. Commissions—That the party of the first part (Dabney & Martin) will pay to the party of the second part (Yowell & Yowell), as compensation for services rendered, commissions in accordance with the following table of rates: [Here follows table.]

"That no commissions shall be payable on interest; or after the termination of this contract, except such as may accrue on notes secured prior thereto."

Then, in typewriting: "(See below.)"

Below, following printed section No. 15, appears a typewritten addition, which contains a special provision as to renewals under former contracts, as follows:

"Renewals—Former Contract.—That the party of the first part will pay to the party of the second part, provided this contract remains in force, the balance of nine renewal commissions of three (3) per cent, on endowment policies paid by less than twenty annual premiums, and five and one-half (5½) per cent. on all other forms of policies, from the date of each particular agency, on the business heretofore belonging to the agency of Yowell & Dabney, secured prior to March 15, 1909, and on the personal business of Jas. A. Yowell secured between June 15, 1912, and July 1, 1912, and five (5) per cent. on the personal business of Joel E. Yowell secured subsequent to March 15, 1909; as the premiums are collected in cash, less commissions, if any, due subagents.

"Collection Fee.—That the party of the first part will pay to the party of the second part, during the continuance of this contract, a collection fee of one-half (½) of one (1) per cent. on all business covered by the sec-

Yowell v. Life Ins. Co.

tion 'Renewals—Former Contract,' after the completion of the payment of the renewals therein specified."

It will be noted, by the language italicized, that all renewals under former contracts dealt with by this typewritten addition are limited to, and dependent upon, the continuance of the present contract.

Printed section 7 is as follows:

"7. Relations.—That, should the contract which is now or may hereafter be in existence, between the parties of the first and third parts (i. e., between Dabney & Martin and the company) be terminated in any manner, the party of the second part (Yowell & Yowell) shall thereupon become the agent of the third party, or of such successor as it may designate; and that the provisions of this contract as to the obligations and compensations of the said party of the second part shall define the rights of the said second party with the party of the third part. But nothing herein shall be construed to require the party of the third part to pay the party of the second part any commissions which became payable to him before the termination of the contract between the parties of the first and third parts."

Then, in typewriting: ("See below.")
Below, immediately following the *addendum* to section 4, appears this typewritten section:

"No. 7. Relations—Renewal Rights.—That the party of the first part will pay the balance of nine (9) renewal commissions from the date of each particular policy, provided the party of the second part continues to serve until the expiration of this contract; or if he refuses to accept any of the adjustment as provided in article 6; or in the event of the death of either party of

Yowell v. Life Ins. Co.

the second part; or in the event of the withdrawal of the party of the third part from the aforesaid territory.

“That the party of the first part will pay five (5) renewal commissions, but not to exceed nine (9) on any one particular policy from its original date, in event of the cancellation of this contract on account of the failure of the party of the second part to comply with any of the provisions of the third paragraph of article 15.”

Section 15 above mentioned is for the most part printed, and is in part as follows:

“That this contract shall be terminated in event that the party of the third part shall withdraw from the territory assigned; or should be prevented for any cause, from doing business in the territory in which the party of the second part is operating.

“That this contract shall be null and void, at the election of the party of the first part, or, on his failure to act, at the election of the party of the third part, if the party of the second part shall fail—” (to do certain things specified,) “or . . . shall fail to secure, deliver and pay for \$100,000 of insurance during the remainder of 1912, and \$200,000 annually thereafter.”

All the above is in printed form except the italicized figures.

Then comes this typewritten addition:

“That in the event of the death or retirement of either party of the second part the surviving or remaining partner shall have the option of continuing this contract.”

The present controversy, as above stated, is waged over these provisions of the contract.

Yowell v. Life Ins. Co.

The complainant J. A. Yowell, having quit the service of the company, under circumstances hereinafter set forth, and the general agents, Dabney & Martin, having undertaken, at Joel Yowell's request, to cancel his contract within six months of the date of the contract, for failure to write the required quota of \$100,000, the question arises: Are the Yowells entitled, since the termination of the contract, to renewal commissions arising under former contracts as described in the *addendum* to section 4?

If these renewals fall exclusively under section 4 and its typewritten *addendum*, it seems evident that they would not be so entitled, because the rights given by these clauses of the contract are expressly made dependent on the continuance of the contract.

But if the typewritten *addendum* to section 7 covers all classes of renewals, both those arising under the present contract, and those arising under former contracts, a different case is presented. For this *addendum* to section 7 contains a stipulation that Dabney & Martin will pay five renewal commissions, etc., in the event of the cancellation of the contract by reason of the failure of the Yowells to comply with any of the provisions of the third paragraph of article 15; one of said provisions relating to cancellation for failure to write the annual quota of \$100,000.

Before deciding this question, it will be helpful to consider other facts attending the execution and termination of the contract.

There is in many respects a conflict between the parties as to what took place in the discussion when the contract was drawn; the complainants testifying one

Yowell v. Life Ins. Co.

way, and Hommeyer and Dabney the other. Martin was not present.

On one circumstance, however, all agree, viz. that Mr. James A. Yowell stated that he might wish to retire to his farm and that he wanted his son Joel in that event to continue the contract for his (Mr. Yowell's) benefit.

This request was granted and Joel E. Yowell was made a party to the contract, and the following type-written addition was accordingly inserted:

"That in the event of the death or retirement of either party of the second part the surviving or remaining partner shall have the option of continuing the contract."

The contract was signed by the Yowells on June 21, 1912. It was not signed by the company until some days later—possibly July 4th or 5th. But the Yowells considered it in force from June 21st (as they testify) and went to work under it with great enthusiasm. They turned in one application on June 21st, the very day of signing the contract; another on June 26th; another on July 2d. Some of this business necessitated trips to an adjoining county.

On June 24th trouble arose under the new contract in connection with the publicity given in the daily press to the consolidation of the agencies of Dabney & Martin and the retirement of Mr. Yowell as general agent.

Mr. Yowell says he knew that Mr. Dabney had a weakness for advertising through the newspapers, and that Mr. Hommeyer promised him that the publicity features would be handled through the home

Yowell v. Life Ins. Co.

office and that he (Yowell) would have as much prominence as he had enjoyed under his former contract with the company.

On June 24th articles appeared in the daily press highly laudatory of Dabney & Martin, but saying very little about Mr. Yowell, and making it appear that he would be retained in a subordinate capacity.

On June 25th Mr. Yowell wrote the home office inclosing copies of the article, reminding the company of Hommeyer's promise, and asserting that he "was not getting a square deal." The company took no notice of this letter.

Mr. Yowell felt greatly "humiliated" (to quote his language) by this treatment. He continued working for several days, as already shown; but, when it became evident that the company was ignoring his letter, he felt much chagrined, and that he could not longer remain in its employ without sacrificing his self-respect.

The contract came back from Cincinnati signed on behalf of the company on July 4th (as the Yowells say), or on July 6th (as defendants say). At any rate, as soon as it was received, the Yowells consulted their counsel as to the meaning of the typewritten addition to section 7 and as to what their rights would be in case they both quit the company. Under counsel's advice, Joel Yowell was sent to Cincinnati on the same day to have the company put a written construction upon the contract in line with the Yowell's statements as to what the intention of the parties was. It is claimed that Mr. Hommeyer did write a letter giving the contract the desired construction, and it is ad-

Yowell v. Life Ins. Co.

mitted that his superior officer refused to sign this letter.

There is also evidence tending to show that Mr. James A. Yowell, before sending his son to Cincinnati, asked Mr. Dabney to write the home office requesting that the contract be amended so that the Yowells might get their renewals even if they went to another company. This like much else in the record, is controverted; but the point to be noted is that the Yowells who before these newspaper publications had gone to work writing insurance with the utmost enthusiasm—not even waiting for their contract to be formally executed and delivered—were now chiefly concerned with its termination and with the effect this would have on their renewals.

Mr. James A. Yowell made no effort to write any other business for the company, and under date of July 13, 1912, wrote Dabney & Martin as follows:

“Dear Sirs: In accord with my contract with you of July 1, 1912, I hereby notify you of my retirement and Mr. Joel E. Yowell will continue to act under the contract.”

On July 14th he discussed with a representative of the Penn Mutual the question of writing insurance for that company, and on July 15th signed a formal contract in this behalf.

Joel E. Yowell remained with the company for some six months longer, but wrote no substantial business during that time.

It is not denied that in October, 1912, he had a talk with the defendant Martin and expressed his desire that Dabney & Martin cancel his contract.

Yowell v. Life Ins. Co.

Accordingly, under date of January 7, 1913, Dabney & Martin wrote Joel E. Yowell:

"Upon examination of our records, we find that you failed to produce the required amount of paid for business from July 1st to December 31st, 1912, as called for in article 15, paragraph 3, of your contract bearing date of July 1st, 1912, and inasmuch as you stated to Mr. J. B. Martin in October that you would like for us (Dabney & Martin) to cancel your contract, we hereby notify you that your contract dated July 1st, 1912, terminated January 1st, 1913. Kindly return passbooks, contract and other supplies belonging to the Union Central, and oblige."

Coming now to the construction of the contract, it may be noted in the first place that the language of the addendum to section 7 is taken almost *verbatim* from the previous contracts of 1908 and 1909. It seems to be a part of the printed form of those contracts between the general agents and the company, which for some reason was omitted from the printed form for sub-contracts, although the record contains no direct evidence on this point.

If our inference be correct, such a provision in the printed form would more naturally refer to renewals under that particular contract; and, as we have seen, renewals under former contracts seem in every instance to have been covered by typewritten additions.

But a more significant circumstance is this:

The Yowells, at the time they signed the contract, had no thought of leaving the company or of working for any other company. The contract, in the addition to section 4, specifically reserved these renewals on

Yowell v. Life Ins. Co.

former contracts during the continuance of the contract; and by the addition to section 15, Mr. Yowell was permitted to retire at any time and his son could continue the contract. There is no doubt on the record that this particular clause was inserted to permit him to retire to his farm should he feel so inclined.

Other parties so testify, and, speaking of his conversation with Hommeyer at the time the contract was drawn, Mr. Yowell himself says:

"Q. Then that provision was placed in the contract at your instance and for your benefit?

"A. And heartily co-operated in by Mr. Hommeyer, as he stated he wanted to protect my old business."

This was the way, then, in which the old business was to be protected—Mr. Yowell expected to stay with the company unless he retired to his farm, in which event Joel Yowell would keep the contract going for his father's benefit as well as for his own.

The Yowells both testify as to the father's pride in the company, and his belief that he really could not talk insurance or write insurance for any other company.

We cannot believe that such an idea as voluntarily leaving the company, or working for another company, was present in the mind of either of them when the contract was signed.

Moreover, the Yowells knew from the written refusal of the company to approve Hommeyer's arrangement that the company would not give him a "vested interest" in these renewals; i. e., secure them to him absolutely.

Yowell v. Life Ins. Co.

It is earnestly argued that this letter of refusal only referred to one of the matters covered by this memorandum, viz. the "direct contract." But we do not think its language can be so restricted. Again, Mr. Yowell himself comments upon the entire failure of the Hommeyer tentative agreement.

The Yowells, we think, did not mean to cover in the present contract the contingency of voluntarily leaving the company and going to work for another, because no such contingency was in their minds.

It was only when Mr. James A. Yowell was humiliated (as he thought) by the publicity incident, and by the failure of the company to set him right, that he began to consider this. Then came the doubt as to the meaning of the contract, and consultation with counsel, the conversation with Dabney, the sending of Joel Yowell to Cincinnati—all apparently with the idea of ascertaining whether the addition to section 7 could be made to cover such a contingency.

When all these circumstances are considered, the correct construction of the contract is plain. The parties meant to confine the renewals under former contracts to the continuance of the present contract, and this was specifically stated in section 4 and its typewritten addition.

The typewritten addition to section 7 was apparently modeled from the printed forms of previous contracts, and its general language was meant to apply only to renewals arising under the present contract.

The chancellor therefore reached a correct conclusion as to the meaning of the contract.

Yowell v. Life Ins. Co.

It is true, as argued by the appellant's counsel, that the company's representative, Hommeyer, drew the contract, and that an instrument, in cases of doubt, will be construed most strongly against the party in whose behalf it was drawn. *Perkins Oil Co. v. Eberhart*, 107 Tenn., 409, 416, 64 S. W., 760.

But, giving the Yowells the full benefit of this principle, as against the company, the contract itself, when read in connection with the facts and circumstances shown by the record, makes it impossible to sustain the appellants' contention.

We are also inclined to agree with some of the criticisms made by appellants' counsel on the conduct of the defendants, or some of them.

It seems evident that the intention to consolidate the agencies of Dabney & Martin was not disclosed to Mr. Yowell, and that he would not have sold out his interest to Dabney had he been advised of such intention. While the term "concealment" is too strong, there was perhaps a certain lack of frankness in this behalf.

It seems further probable that the promise of a "direct contract" was used, to some extent, as a bait to induce Mr. Yowell to enter into the arrangement, and thus eliminate him as a factor in the troublesome situation arising from the two general agencies; and that this was done with the knowledge of the company.

It appears, moreover, that Mr. Yowell had some cause for complaint with regard to the publicity incident. According to his testimony, there was a distinct understanding with Mr. Hommeyer about this, and Mr. Hommeyer does not contradict him. This

Yowell v. Life Ins. Co.

incident can hardly be dismissed as trivial; for, in the business of life insurance, advertising and publicity seem to be legitimate and vital factors.

But, conceding all this, the present suit is not one to rescind the contract on account of fraud, if indeed such a suit could have been maintained—a matter not before the court. The present suit is based on the contract, and the appellants are claiming under it and basing their contentions upon its construction.

We think the chancellor reached a correct result as to the meaning of the contract.

Second. It is, however, argued with force and ability that there was a practical construction of the contract by the parties themselves contrary to the conclusion which we have reached, and that this is binding.

The principle involved is, of course, well established. *State ex rel. v. Vanderbilt University*, 129 Tenn., 279, 329, 164 S. W., 1151; *Chicago v. Sheldon*, 9 Wall., 50, 54, 19 L. Ed., 594; *Topliff v. Topliff*, 122 U. S., 121, 131, 7 Sup. Ct. 1057, 30 L. Ed., 1110; Elliott on Contracts, volume 2, section 1537.

As stated by the United States supreme court in the leading case of *Chicago v. Sheldon*, supra:

“In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence.”

It is equally well settled, however, that this rule only applies in cases where the contract is ambiguous and the intention doubtful; and “it ought to appear with reasonable certainty that acts alleged to have been per-

Yowell v. Life Ins. Co.

formed in the construction of the contract were in fact the voluntary acts of both parties performed with knowledge of the terms of the contract and in view of a purpose at least consistent with that to which they are sought to be applied." Elliott on Contracts, volume 2, sections 1541, 1542; Page on Contracts, volume 2, section 1126; *Sternbergh v. Brock*, 225 Pa. 279, 74 Atl., 166, 24 L. R. A. (N. S.), 1078, 133 Am. St. Rep., 877.

The facts chiefly relied on by appellants to bring the case within the general rule are, in substance, these:

That while the contract was cancelled as of January 1, 1913, Dabney & Martin continued to pay renewal commissions on business under former contracts until some time in March, 1913, when the company wrote to the Yowells, under date of April 30, 1913, stating that these commissions had been paid by mistake and requesting their repayment.

The record shows, however, that the company was ultimately paying this money—not Dabney & Martin—and, while it allowed these payments to Dabney & Martin, it is not clearly shown just how and when the company received notice of the cancellation of the contract. The auditor of the company would seem to have been the official who could give this explanation, and, while some letters of his appear in the record, neither side took his deposition.

Dabney & Martin seem to have been quite willing to pay the renewals so long as the company made no objection; for it was the company's money, not theirs. And the record shows that they would have continued to pay if they had not been ordered by the company to discontinue.

Yowell v. Life Ins. Co.

But both Dabney and Martin testify that they construed the contract differently from the Yowells, and that their construction of the contract was stated to the Yowells in conversations which are detailed. While the evidence of the Yowells tends to contradict this, it seems evident that the record fails to show such a practical construction by both parties as is contemplated by the rule, even if the contract be sufficiently ambiguous to permit its application.

Third. Did the Yowells enter into the contract without any intention of keeping it?

The defendants' counsel relies upon the principle that the making of a promise with deceitful purpose, by one having no intention of fulfilling it, is a fraud which will avoid a contract, citing *Cerny v. Paxton & Gallagher Co.*, 78 Neb., 134, 110 N. W., 882, 10 L. R. A. (N. S.), 640, and authorities reviewed in the case note; and these authorities seem to sustain his insistence.

But, even if the rule invoked could apply under the pleadings in the present state of the record (a matter not necessary to decide), we find no facts to warrant its application.

As already stated, the record clearly shows that the Yowells signed this contract about June 21, 1912, and went to work under it with enthusiasm. We think they had the intention of performing their agreement at the time they entered into the contract.

Fourth. Can the recovery allowed by the chancellor under the cross-bill be sustained?

As heretofore stated, the company continued paying renewals (or rather allowing Dabney & Martin credit

Yowell v. Life Ins. Co.

for paying renewals), for some weeks after the cancellation of the contract by Dabney & Martin. The aggregate sums so paid amount to \$482.03, and for this the chancellor gave a decree to the company, under its cross-bill.

The cross-defendants Yowell filed a demurrer and answer resisting the relief sought on various grounds —among others, that the payments by Dabney & Martin were voluntary; that no fraud or collusion was charged between the Yowells and Dabney & Martin; that the payments were made under pure mistake of law.

The question of mistake of law as to the effect of an instrument has been much discussed. See case note to *Dolvin v. American Harrow Co.*, 125 Ga., 699, 54 S. E., 706, as reported in 28 L. R. A. (N. S.), 785. But we find it unnecessary to pass upon this point.

The allegation of the cross-bill was "that these payments were made without its (the company's) authority or knowledge," and the issue thus presented was one of fact.

The chancellor, as already stated, refused to hear any evidence in this case.

Had he done so, he probably would not have sustained the recovery under the cross-bill. The burden was on the company, under its cross-bill, to make out a mistake of fact, to show just how and when it received notice of the termination of the agreement, and why these payments were allowed in the reports of Dabney & Martin; and, even if it could overcome the legal propositions advanced by the demurrer, it has failed to support this burden.

Yowell v. Life Ins. Co.

The result is that the chancellor's decree will be modified so as to dismiss the crossbill, as well as the original bill.

The costs will be equally divided between the Yowells and the Union Central Life Insurance Company.

Mr. Justice Williams, being incompetent, took no part in the hearing or decision of this case.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
IN THE
SEPTEMBER TERM, 1918.

D. M. ROBERTS *v.* SOUTHERN RY. CO.

(*Knoxville.* September Term, 1918.)

1. **MASTER AND SERVANT.** Injuries to servant. Actions. Declaration.

In action by administrator of deceased minor brought under the federal Employers' Liability Act for the death while obeying instructions in the operation of a freight train, declaration held sufficient in respect to allegations as to the existence of the relation of master and servant. (*Post*, pp. 99-101.)

Acts cited and construed: Acts 1908, ch. 149, p. 65; Acts 1910, ch. 143, sec. 2.

Cases cited and approved: Illinois Central Ry. Co. *v.* Messina, 240 U. S., 395; Southern Ry. Co. *v.* Linear, 138 Tenn., 543.

2. **APPEAL AND ERROR.** Preservation of defenses. Federal Employers' Liability Act. Special Damages.

The objection that the administrator of a deceased minor servant, in his action under the federal Employers' Liability Act for damages for the negligence of a fellow servant, failed to allege pecuniary loss must be raised at the trial. (*Post*, pp. 101, 102.)

Cases cited and approved: Jones *v.* Cullen, 100 Tenn., 24; Carson *v.* Peterson, 105 Tenn., 541; Coal & Coke Co. *v.* Steel Co., 123 Tenn., 428; Boshwitz *v.* Lauhorn, 131 Tenn., 705.

Case cited and distinguished: Railway Co. *v.* Anderson, 134 Tenn., 687.

FROM KNOX.

Appeal from the Circuit Court of Knox County.—
VON A. HUFFAKER, Judge.

Roberts v. Southern Ry. Co.

W. R. HENDERSON, for D. M. Roberts.

ROSCOE WORD, for Southern Ry. Co.

MR. COX, Special Judge, delivered the opinion of the Court.

This is an action for damages arising out of the death of the fifteen year old son of plaintiff in error, the declaration alleging that the killing was the result of the negligent, wrongful, and unlawful conduct of the agents and servants of defendant in error. It is alleged that the deceased met his death in February, 1916, while upon a freight train of the railway company at Hot Springs, N. C., the train and cars being engaged in interstate transport at the time. The action is brought, therefore, under the provisions of what is commonly known as the federal Employers' Liability Act, being Act April 22, 1908, 35 Stat., chapter 149, p. 65, as amended by the Act of April 5, 1910, 36 Stat., chapter 143, section 2, p. 291 (U. S. Comp. St. 1913, sections 8657-8665). It is further alleged that plaintiff in error is the duly qualified administrator of the deceased, and that the latter left surviving him the plaintiff in error, his father, and his mother, Kate Roberts, wife of plaintiff in error. The action is for \$10,000 damages. The declaration alleges, among other things, the following:

"That on the date aforesaid plaintiff's intestate, William Arlie Roberts, with the consent and procurement of the agents and servants of the defendant in charge and in control of said train, boarded said train at Knoxville, Tenn., for the purpose of riding upon the

Roberts v. Southern Ry. Co.

same to Aseville, N. C., under a contract of employment entered into between him and the agents and servants of the defendant company in control of said train whereby he was to ride upon said train as an employee and work for defendant company while being thus transported. That the said William Arlie Roberts rode upon said train from Knoxville, Tenn., to a short distance beyond to Hot Springs, N. C., doing such work along the way as was assigned to him by the agents of the defendant in charge of said train."

It is then averred that the train left Knoxville at about one o'clock in the afternoon, and reached Hot Springs at about 11 o'clock at night; that the deceased was young and inexperienced, and did not fully appreciate, understand, or realize the dangers and risks of the undertaking, and that these facts were well known to the agents and servants of the defendant railway company, or, by the exercise of reasonable care, should have been known to them; that the employment of the deceased by the agents and servants of the railway company, under these facts and circumstances and in this manner, constituted gross negligence; that upon the train reaching Hot Springs, N. C., the deceased disembarked, along with the other employees of the railway company, and assisted in putting freight on board, after which the train moved forward towards its destination, viz., Aseville, N. C.; that shortly after the train had resumed its movement from Hot Springs, and, "while the train was in rapid motion over a rough and uneven track and through the darkness, the agents and servants of the defendant company then and there in

Roberts v. Southern Ry. Co.

charge of said train negligently and wrongfully ordered the said William Arlie Roberts to go back over said train to an empty box car near the rear of the train and reamin in it until he reached Aseville; that in order to obey these orders it was necessary for plaintiff's said intestate to walk along the top of said cars while they were in rapid motion over said rough and uneven track and pass from one car to another by jumping over the intervening distance in the darkness; that this could be safely accomplished only by one having experience in said work or employment; that the said William Arlie Roberts thereupon attempted to obey said orders given him as aforesaid, and, while attempting to pass along the top of said train, was thrown and caused to fall by the swerving and jerking of the car on which he was riding, and fell between the cars of said train and was run over, crushed and killed under the wheels of said train."

The declaration was amended by adding the following further averment, to wit:

"That the employment of the said William Arlie Roberts by the agents and servants of the defendant in charge and control of said train on said occasion was in accordance with the long-established usage, custom, and practice of the defendant of allowing, permitting, and procuring its said agents and servants in charge of its freight trains to hire special employees as their services should be needed and under circumstances similiar to those alleged herein; that said agents and servants of defendant were, on the occasion aforesaid, acting within their authority in employing said William Arlie Roberts."

Roberts v. Southern Ry. Co.

The railway company interposed a demurrer to the declaration, raising the following five questions, to wit: (1) That the declaration does not allege a cause of action, in that no breach of legal duty owing by the railway company to the deceased is averred; (2) because the facts alleged do not show that the deceased was an employee of the railway company at the time of his death; (3) because, under the facts alleged, it is not shown that the deceased was a passenger of the company; (4) because the facts alleged show that the deceased was a trespasser, and the company would only be liable for willful or wanton injury caused by its servants; and (5) because the facts alleged show that at the time of his death, intestate was riding the train in violation of the federal statutes regulating interstate commerce, and especially the statute applicable to free transportation to persons by the interstate carrier from one state to another.

The demurrer was sustained by the court below upon all of the grounds stated, and the court of civil appeals reversed the judgment of the court below, holding that, while the declaration contains some expressions which lend support to the view that the boy was a trespasser or licensee and was upon the train by the connivance of the agents and servants of the railway company, and without formal employment, that the averments of the declaration are sufficiently emphatic to show that the deceased was an employee of the company at the time of his death, and that that and other questions raised can only be determined upon the evidence introduced at the trial.

In this holding we concur.

Roberts v. Southern Ry. Co.

The decision of the second ground of demurrer is determinative of the other questions raised, and the resolving of this question in favor of the plaintiff below renders unnecessary a discussion of the other questions above set forth, as raised by the demurrer and assignments of error.

It is true that some of the statements made in the declaration seem to indicate that the deceased was upon the freight train in question for the purpose of being "transported;" but, taking the declaration as a whole, and the portion quoted above, we think it definitely appears that he was in the employment of the defendant below, and that such employment was effected by the agents and servants of the railway company duly empowered and authorized to act in the matter, and with the knowledge, consent, and acquiescence of the company. We do not see how the averments of the declaration can be admitted as true (which is done by demurrer, for the purpose of testing the sufficiency in law of the averments of the declaration), without admitting averments constituting a cause of action.

We have considered the cases cited and relied on by the railway company, viz. *Illinois Central Railway Co. v. Messina*, 240 U. S., 395, 36 Sup. Ct., 368, 60 L. Ed., 709, and *Southern Railway Co. v. Linear*, 138 Tenn., 543, 198 S. W., 887, L. R. A., 1918B, 1114, upon its theory that the deceased was a passenger upon the freight train, but, as above stated, in our view of the case, these cases are not now applicable. The conclusion cannot be reached, from the averments of this declaration, that the deceased was a passenger upon said

Roberts v. Southern Ry. Co.

freight train, or that he was riding in violation of the federal statute relating to free transportation. In order to come to such a conclusion, it would become necessary to infer a fact not set forth in the declaration; and this would have to be done in the face of, and in direct contradiction to, the positive averment that the deceased was upon the train "as an employee."

It is also urged in this court by the railway company that the declaration is fatal because, having been brought under the federal Employers' Liability Act, for damages for the negligence of a fellow servant, it is necessary that the declaration allege the pecuniary loss to the beneficiary. It does not appear that this question was raised or suggested in the courts below, either by the demurrer, the motion for a new trial, or assignments of error. The company refers us to *Railway Co. v. Anderson*, 134 Tenn., 687, 185 S. W., 682 L. R. A., 1918C, 1115, Ann. Cas. 1917D, 902, where this court said among other things:

"We find it necessary again to point out that there should, in suits founded on this act, be pleadings avering the . . . losses which plaintiffs expect to prove."

It will be seen however, that in that case, in accordance with the many other decisions of this court, it was recognized "that matters of substance omitted from a declaration might be cured by plea or amendment." 134 Tenn., pp. 676-681, 185 S. W., 679, 680, and cases cited. We do not find it necessary or proper to pass upon this question upon this record, for the reason that under the sions of this court heretofore the lower courts will not be placed in error upon matters raised for the first time in this court, when same were not raised or suggested in the

Roberts v. Southern Ry. Co.

courts below. *Jones v. Cullen*, 100 Tenn., 24, 42 S. W., 873; *Carson v. Peterson*, 105 Tenn., 541, 58 S. W., 1060; *Coal & Coke Co. v. Steel Co.*, 123 Tenn., 428, 131 S. W., 988, 31 L. R. A. (N. S.), 278; *Boshwitz v. Lawhorn*, 131 Tenn., 705, 176 S. W., 1037, and many other cases in accord. The wisdom of this rule or principle is made manifest and apparent in the instant case. We have no reason to doubt that, had the question been raised or suggested in the circuit court, the plaintiff below would have cured this omission by amendment to the declaration; at least, he would have been afforded the opportunity to have done so. Upon remand, this opportunity might yet be availed of, as held in *Railway v. Anderson*, supra.

For the reasons stated, let the decree of the court of civil appeals be affirmed. The railway company will pay all costs of the appeal.

Tate v. Greenlee.

W. A. TATE et al. v. R. M. GREENLEE.*

(Knoxville. September Term, 1918.)

1. TAXATION. Inheritance tax. Collection. Jurisdiction.

Where a bill is filed in chancery to settle an estate, clerk of county court, under Acts 1893, chapter 174, section 22, can maintain petition in such suit to collect inheritance tax. (*Post*, p. 108.)

Acts cited and construed: Acts 1893, ch. 174; Acts 1893, ch. 89, sec. 7.

2. APPEAL AND ERROR. Objection not raised below.

Question as to whether, in bill to settle estate in chancery, clerk of county court can petition to collect inheritance tax, cannot be first raised on appeal. (*Post*, pp. 108, 109.)

Case cited and approved: Shelton v. Campbell, 108 Tenn., 690.

3. TAXATION. Inheritance tax. Property subject.

The only interest that nephews and niece had in estate before intestate's death was the possibility that they might outlive intestate, and assignment by them of rights in estate did not transmit any vested, interest, and estate would be liable to collateral inheritance and succession tax under Acts 1893, chapter 174, and Acts 1893, chapter 89, section 7. (*Post*, pp. 109, 110.)

4. ASSIGNMENTS. Conveyance of expectant estate.

An agreement or covenant to convey by an heir expectant and *sui juris*, if fairly made and based on a valuable consideration, will be enforced as against the grantor and privies, whenever the property comes into his possession, but not until then. (*Post*, pp. 111, 112.)

Cases cited and approved: Fitzgerald v. Vestal, 36 Tenn., 258; Steele v. Frierson, 85 Tenn., 430; Read v. Mosby, 87 Tenn., 759;

*On the question of validity of sale of expectancy by a prospective heir, see notes in 32 L. R. A., 595; 33 L. R. A., 266, 25 L. R. A. (N. S.), 436.

Tate v. Greenlee.

McCrackin v. Wright, 14 Johns. (N. Y.), 193; Davis v. Hayden, 9 Mass., 514; Bayler v. Commonwealth, 40 Pa., 37; Chew v. Barnet, 11 Serg. & R. (Pa.), 389.

Case cited and distinguished: Taylor v. Swafford, 122 Tenn., 303.

FROM GRAINGER.

Appeal from the Chancery Court of Grainger County.
—HUGH G. KYLE, Chancellor.

FRANK PARK, Jr., for appellant.

J. M. GROVE, McCANLESS, COLEMAN & TAYLOR and
FRANK M. THOMPSON, for appellee.

MR. JUSTICE HALL delivered the opinion of the Court.

The question presented on this appeal is one of the liability of the estate of J. M. Cockrum, deceased, which consists entirely of personalty, for a collateral inheritance and succession tax under chapter 174 of the Acts of 1893.

This act provides for a tax upon all estates, real, personal, and mixed, situated in the State, whether the person dying seized thereof lived in the State or not, passing either by will or inheritance, or by deed, grant, bargain, gift, or sale, made in contemplation of death, or to take effect in possession or enjoyment after the death of the grantor to any person or body corporate or politic in trust, or otherwise, when the property thus passing goes to any other than the father, mother, husband, wife, children, and lineal descendants.

Tate v. Greenlee.

By another act passed at the same session of the General Assembly, being section 7, chapter 89, page 146, of the act of 1893, the exemption was extended to brothers, sisters, and wife or widow of a son, and husband of a daughter, and any legally adopted child.

By a further provision of said act of 1893, it is made the duty of the county court clerk, wherein such estates are located, to collect such tax, and the clerk is given the power to institute such suits as may be necessary for the collection of the same.

By section 22 of said act it is made the duty of the chancery court to see that said tax is paid to the clerk of the county court upon all estates being wound up or administered in said court, where such estates are liable for such tax, and such tax must be paid or retained before a legacy or share of the estate is paid or turned over to the owner; and, if any such tax is received by the clerk and master, it shall be ordered paid by him to the county court clerk, etc.

J. M. Cockrum died intestate and a resident of Grainger county, Tenn., on June 6, 1917. Some time prior to his death, on account of extreme age, he became mentally incapacitated to care for his property, and by proper proceedings had in the county court of Grainger county for that purpose the defendant, Greenlee, was appointed guardian for him, and as such guardian took charge of his estate and managed and controlled the same up until his death. The net value of said estate, upon the date of the death of the said J. M. Cockrum, was \$12,463.72. Mr. Cockrum left no widow, children, descendants of children, or brother or sister

Tate v. Greenlee.

surviving him, but left as his next of kin and only heirs at law his nephews, Joe Cockrum and A. M. Cockrum, and his niece, Malissa Martin, who, upon dates prior to the death of the said J. M. Cockrum, by separate instruments, assigned and transferred their respective expectancies in said estate to the complainants, W. A. Tate and G. L. Greenlee.

Thereafter, on August 9, 1917, which was after the death of the said J. M. Cockrum, Tate and Greenlee assigned and transferred to their co-complainant, Frank Park, Jr., a one-third undivided interest in said estate, over and above the aggregate amounts paid the nephews and niece of said Cockrum for their respective expectancies, which was the sum of \$7,750. In other words, Tate and Greenlee, by said assignment, transferred to said Frank Park, Jr., one-third of the profits realized from their purchases of said expectancies.

The assignment to Park was based on the consideration that, before the assignments by said nephews and niece of their expectancies in said estate to the complainants Tate and Greenlee, and before the death of the said J. M. Cockrum, said nephews and niece employed said Park, who is a regular practicing attorney, to institute proceedings to have a guardian appointed for said J. M. Cockrum, and to institute certain suits to recover his property, which he had undertaken to sell and convey while mentally incapacitated to do so, and agreed with said Park that he should have, for his services in said litigations, a one-fourth interest in said estate when the same should pass to said nephews and niece upon the death of the said J. M. Cockrum.

Tate v. Greenlee.

Upon the death of the said J. M. Cockrum, and the guardian refusing to make settlement with complainants and surrender to them said estate, they filed the bill in this cause, alleging that they were the owners of said estate by virtue of said assignments hereinbefore mentioned, and asking that the guardian be required to pay the assets of said estate into court, and that said estate be wound up and administered in this cause, and that a decree be rendered against the guardian for the amount of said estate, after the payment of debts, shown to be due complainants under and by virtue of said assignments.

On September 11, 1917, and before the cause had been finally heard, J. M. Grove, clerk of the county court of Grainger county, filed his petition in said cause, in which it was alleged that the estate of the said J. M. Cockrum was liable to the State of Tennessee for a collateral inheritance tax of \$5 upon each \$100 of the clear value of said estate, and asking in said petition that he be given a decree for the use of the State for the amount of such collateral inheritance tax as might be shown to be due the State, and that such amount be impounded in the hands of the guardian of said estate, and that he be ordered to pay said tax to the petitioner for the use of the State.

The complainants answered this petition, admitting the death of the said J. M. Cockrum, and that he left surviving him the nephews and niece hereinbefore mentioned as his only heirs at law. They further admitted that the defendant, R. M. Greenlee, was the regular guardian of the said J. M. Cockrum at the

Tate v. Greenlee.

time of his death. They also admitted having purchased the expectancies of the heirs of the said J. M. Cockrum in his estate, but denied that they or said estate were liable to the State of Tennessee for a collateral inheritance tax, they having become the owners of said estate by purchase, and not by either will or inheritance, or by any deed, grant, bargain, gift, or sale from the owner of said estate made in contemplation of death.

Upon the hearing the chancellor sustained the petition of the county court clerk, adjudging that it was rightfully and properly filed in said cause, and gave him a decree for the sum of \$685.56, which amount was 5 per cent. of the clear value of said estate, together with \$62.50 attorney's fees, and ordered said sums to be paid to said clerk out of the fund then in court. From this decree complainants have appealed to this court.

The first contention made by the assignments of error is that the petition of the county court clerk was wrongfully filed in said suit pending in the chancery court, because, under the act of 1893, the county court alone is vested with jurisdiction of suits for the collection of collateral inheritance taxes.

We are of the opinion that this contention is not well grounded for two reasons:

First. It is provided by section 22 of said act that, in all cases when an estate is being wound up or administered in the chancery court, it shall be the duty of the court to see that the collateral inheritance tax is paid to the clerk of the county court, if such estate be liable for such tax, and to see that such tax is paid or retained before a legacy or share of the estate is

Tate v. Greenlee.

paid or turned over to the owner. The bill in the cause in which said petition was filed by the county court clerk asked that the estate of the said J. M. Cockrum be administered and settled in the chancery court in which it was filed, and that complainants be given a decree against the guardian for the amount of said estate.

Second. The complainants did not raise any question of jurisdiction in the court below. They do not question the jurisdiction of the chancery court in their answer filed to said petition. The only defense made in their answer is that the estate of J. M. Cockrum, in the hands of his guardian, after the assignments by his nephews and niece transferring said estate to them, is not liable for the tax sought to be collected.

In *Shelton v. Campbell*, 109 Tenn., 690, 72 S. W., 112, it was held that the suit of the county court clerk for the collection of collateral and inheritance taxes should be brought in the county court, upon which court jurisdiction is conferred by statute, but such suit may be instituted and maintained in the chancery court, where there is no demurrer or plea to the jurisdiction, but that such suit must be conducted and treated as though it had been brought in the county court, and in accordance with the provisions of the act creating such tax and the remedy for the collection thereof.

It is insisted by complainants that, under the facts, the estate of J. M. Cockrum is not liable for a collateral inheritance tax in the hands of complainants.

We are of the opinion that this contention is not well grounded. As before stated, J. M. Cockrum died on

Tate v. Greenlee.

June 6, 1917, and the assignments or transfers from his nephews and niece to the complainants Tate and Greenlee were executed in April and May, 1917, and said assignment from Tate and Greenlee to their co-complainant, Frank Park, Jr., was made in August, 1917, which was after the death of the said J. M. Cockrum. It follows, therefore, that, at the time of the execution of said assignments by the nephews and niece of J. M. Cockrum to the complainants Tate and Greenlee, who conveyed to the complainant Park, the nephews and niece had no interest in said estate. The only interest which they had in said estate was the possibility that they might outlive their uncle. In other words, they had nothing but bare expectancies in said estate. The estate did not become vested in said nephews and niece until the death of J. M. Cockrum, and then subject to his debts, and any taxes which had been levied or which might be leviable under and by virtue of the statute laws of the state. At the time complainants took their assignments, J. M. Cockrum was alive. The estate was his. He had the right to consume it for his support. He would have had the right, if he had regained his mental powers, to dispose of it by will or in any other manner he saw proper. The assignments by his nephews and niece did not transmit any vested interest in said estate to the complainants. In law said assignments were only agreements or covenants to convey said estate to the complainants Tate and Greenlee when the same should become vested in said nephews and niece, which, as before stated, was upon the death of their uncle.

Tate v. Greenlee.

Such an agreement or covenant to convey by an heir expectant and *sui juris*, if fairly made and based on a valuable consideration, will be enforced as against the grantor and his privies, whenever the property comes into his possession, but not until then. *Fitzgerald v. Vestal*, 4 Sneed, 258; *Steele v. Frierson*, 85 Tenn., 430, 3 S. W., 649; *Read v. Mosby*, 87 Tenn., 759, 11 S. W., 940, 5 L. R. A., 122; *Taylor v. Swafford*, 122 Tenn., 303, 123 S. W., 350, 25 L. R. A. (N. S.), 442.

In the case last cited the court, in discussing this question, said:

"It is an old and well-settled rule of the common law that, in order to constitute a valid contract of sale, there must be a grantor and grantee, and a thing in existence at the time of the contract; hence, under this rule, a mere possibility could not be conveyed. *McCrackin v. Wright*, 14 Johns. (N. Y.), 193; *Davis v. Hayden*, 9 Mass., 514; *Bayler v. Commonwealth*, 40 Pa., 37, 80 Am. Dec., 551; 2 Leading Cases in Equity (White & Tudor's Ed.) pt. 1, p. 1605.

"It is true that recitals and covenants might be of such a character as to conclude parties and privies and estop them from denying the full operation of the instrument, and so in many cases, even in courts of law, such recitals and covenants were held sufficient upon the principle of estoppel to pass to the grantee an interest in the property conveyed, subsequently acquired by the grantor.

"But, independent of the rule of estoppel, both in English and American courts in equity, where it is found that the contract of an expectant has been fairly

Tate v. Greenlee.

made and upon a valuable consideration, it will be enforced, as against the grantor and his privies, whenever the property covered by it comes into possession. This is done, however, by these courts, not upon the ground that the grant is one of a present interest, but rather upon that stated by GIBSON, C. J., in *Chew v. Barnet*, 11 Serg. & R. (Pa.), 389, to wit: 'That a conveyance, before the grantor has acquired the title, operates as an agreement to convey, which may be enforced in chancery between the parties and against purchasers with notice.'

"This seems to be the theory upon which these courts have acted with regard to such contracts."

Applying the rule announced in the above cases to the one at bar, it follows that when J. M. Cockrum died his estate passed to and became vested in his nephews and niece, subject to their agreements or covenants to convey the same to the complainants Tate and Greenlee. It follows, therefore, that upon the vesting of said estate in said nephews and niece it became liable for the collateral inheritance tax provided by statute. The estate could only pass to complainants under their assignments by virtue of the inheritance of the nephews and niece, who were their assignors, from their uncle.

There is no error in the decree of the chancellor, and it is affirmed, with costs.

Lotspeich v. Mayor & Alderman of Morristown.

A. W. LOTSPEICH v. MAYOR AND ALDERMEN OF TOWN OF MORRISTOWN.*

(Knoxville. September Term, 1918.)

1. MUNICIPAL CORPORATIONS. Powers. Delegation.

The powers possessed by municipal officers must be viewed as public trusts, and legislative powers of the board of mayor and aldermen cannot be delegated to the mayor, although mere ministerial powers may be so delegated. (*Post*, pp. 119-125.)

Cases cited and approved: Dillard v. Webb, 55 Ala., 468; Bibel v. People, 67 Ill., 172; Bills v. Goshen, 117 Ind., 221; Koeppen v. Sedalia, 89 Mo. App., 648; Hengst v. Cincinnati, 9 Ohio Dec., 731; Jewell Belting Co. v. Bertha, 91 Minn., 9; People v. McWethy, 177 Ill., 334; McCowell, v. Bristol, 89 Va., 652; State v. Glavin, 67 Conn., 29; Blair v. Waco, 75 Fed., 800; Johnston v. Macon, 62 Ga., 645; Curran Bill Posting & D. Co. v. Denver, 47 Colo., 221; People ex rel. Healy v. Clean Street Co., 225 Ill., 470; Whyte v. Mayor & Aldermen of Nashville, 32 Tenn., 364.

2. MUNICIPAL CORPORATIONS. "Ministerial Act." "Legislative Act."

A purely ministerial function of a municipal officer is one as to which nothing is left to discretion, while legislative acts involve the exercise of discretion and judgment. (*Post*, pp. 125, 126.)

3. MUNICIPAL CORPORATIONS. Delegation of powers. Legislative powers.

Where Acts 1903, chapter 103, under which a city was incorporated, vested in the board of mayor and aldermen all power to contract, an arbitration agreement made by the mayor with one whose property the city desired to condemn for a new city hall building was

*On the question of delegation of municipal power as to city property; contracts, etc., see note in 20 L. R. A., 727.

Lotspeich v. Mayor & Aldermen of Morristown.

void, for, though the board of mayor and aldermen by resolution directed the mayor to enter into a written agreement of arbitration, and select arbitrators, held, that such acts involved discretion, and the power to perform the same could not be delegated. (*Post*, pp. 125, 126.)

Acts cited and construed: Acts 1903, ch. 103.

Case cited and approved: City of Biddeford v. Yates, 104 Me., 506.

FROM HAMBLEN

Appeal from the Chancery Court of Hamblen County.
—HON. HUGH G. KYLE, Chancellor.

J. A. CARRIGER, for appellant.

RUFUS M. HICKEY, for appellees.

MR. JUSTICE HALL delivered the opinion of the Court.

The bill in this cause was filed by the complainant, A. W. Lotspeich, against the mayor and aldermen of the town of Morristown, seeking to enforce an award of arbitration made pursuant to an alleged arbitration agreement entered into in writing by W. B. Whittaker, mayor of the defendant, on August 3, 1916.

The defendant, mayor and aldermen of the town of Morristown, answered the bill, setting up in its answer the defense, by plea of *non est factum*, that the mayor was without authority to bind the city under said agreement, it appearing that said arbitration agreement executed by him was never reported to the defendant, and the same was never ratified by it.

Lotspeich v. Mayor & Aldermen of Morristown.

This defense was sustained by the chancellor, and complainant's bill was dismissed. From this decree complainant has appealed to this court, and has assigned the action of the chancellor in dismissing his bill for error.

It appears from the record that the defendant, mayor and aldermen of the town of Morristown, having determined to build a city hall for the city of Morristown, and being desirous of securing additional ground upon which to erect said structure, by resolution passed on July 1, 1916, authorized and directed its city attorney to file condemnation proceedings against the complainant in the circuit court of Hamblen county, Tenn., to have condemned for said purpose a lot or parcel of land adjoining a lot already owned by the city situated at the corner of First North and Henry streets in the city of Morristown. The lot or parcel of land sought to be condemned by said proceedings in the circuit court lies on the eastern boundary of the lot then owned by the city known as the "city hall" lot, and fronts and is bounded on the south by First North street, commencing at the southeast corner of the city hall lot, and running parallel with First North street twenty feet east; thence northwardly a direct line eighty-seven feet; thence eastwardly a direct line twenty feet; and thence southwardly a direct line eighty-seven feet to the beginning.

This suit was pending in the circuit court of Hamblen county, and had not been disposed of, when, on July 7, 1916, the defendant, in regular session, passed the following resolution:

Lotspeich v. Mayor & Aldermen of Morristown.

"On motion of Alderman Jas. E. Burke, and seconded by Alderman S. J. Felknor and by the affirmative vote of the board, the mayor, W. B. Whittaker, was directed to enter into a written agreement of arbitration on behalf of the mayor and aldermen of the town of Morristown, with A. W. Lotspeich, to select a jury of view, etc., to determine the value of a certain lot lying and situate between the present city hall lot on First North street and the new brick building of the said A. W. Lotspeich, to acquire same for city hall purposes, and to take such steps as are necessary to effect a speedy settlement with said Lotspeich for the acquirement of said lot."

Thereafter, on August 3, 1916, the mayor of the defendant, W. B. Whittaker, pursuant to said resolution, entered into the written arbitration agreement with the complainant hereinbefore referred to. This agreement is lengthy, and we will not undertake to set it out *in hæc verba* in this opinion, but only such of its stipulations will be referred to as may be material to the determination of the questions to be hereinafter considered, which, we think, is determinative of the cause.

The resolution of July 7th expressly described the lot or parcel of land which was to be made the subject of the arbitration agreement to be entered into by the mayor with the complainant as a strip of land lying between the present city hall lot on First North street and the new brick building of the complainant, which lot, the proof shows, has a frontage of twenty-five feet on First North street, while the mayor assumed to agree with complainant to arbitrate with respect to a strip of

Lotspeich v. Mayor & Aldermen of Morristown.

land fronting nineteen feet on First North street and running back eighty-five feet, the nineteen feet being only a portion of the twenty-five foot lot.

The mayor, acting under said resolution, selected an arbitrator for and on behalf of the defendant, to wit, John M. Williams. The complainant selected L. W. Brown as the arbitrator on his behalf, and the mayor and complainant mutually agreed on James Robinson as the third arbitrator. The mayor further agreed that, in fixing the value of the property taken and the incidental damages to the portion not taken, the arbitrators should proceed according to the law of eminent domain. He further agreed that there should be no appeal from the award of the arbitrators, and that the award should be final and could be specifically enforced. He further agreed that the defendant, mayor and aldermen of the town of Morristown, should pay the taxes assessed against said property for the year 1916, together with paving assessments outstanding, which the proof shows to be approximately \$50. He further agreed that the mayor and aldermen of the town of Morristown should construct a wall out of stone, cement, or other suitable material on the line between the property of the city and the property of the complainant, and that said wall should be built entirely on the property of the defendant. He further agreed that the defendant should dump, without expense to the complainant, all surplus dirt that it might have by reason of any excavation incident to the building of its city hall and preparing alleys, etc., on the remaining property of the complainant, or on such parts thereof as he might designate or

Lotspeich v. Mayor & Aldermen of Morristown.

indicate. He also agreed that the complainant and his vendees should have free use of the alley to be opened up by the defendant on the north or east of said city hall to be erected by it.

On August 11, 1916, the arbitrators so selected, after being duly sworn, proceeded to act under said arbitration agreement, and fixed the value of the lot mentioned and described in said arbitration agreement at the sum of \$1,710, which sum was awarded to the complainant for said lot. They awarded to the complainant, as incidental damages, the sum of \$1,400, as follows: \$450 to the six feet as described in the agreement to arbitrate lying between the new brick building of said Lotspeich and the said nineteen feet sought to be appropriated, and \$950 resulting to said Lotspeich on account of not being able to use to advantage the western wall of his said brick building. The total amount awarded to the complainant as the value of the land taken and incidental damages to the remainder was the sum of \$3,110.

The arbitration agreement and the award of the arbitrators based thereon were never reported to the defendant, and were never ratified by it.

The complainant, after said arbitration was had and the arbitrators had made report of their findings in writing tendered to the defendant a deed for said property duly executed in accordance with said award, which it refused to accept. Whereupon the present bill was filed, and the deed tendered with the bill, and upon final hearing the bill was dismissed by the chancellor, as before stated.

Lotspeich v. Mayor & Aldermen of Morristown.

The chancellor held that the defendant was not bound by the arbitration agreement entered into with the complainant by its mayor on August 3, 1916, and was not bound by the award of the arbitrators selected under said agreement, because the resolution previously passed by the defendant on July 7th authorizing its mayor to enter into said arbitration agreement was an unlawful delegation of its powers to the mayor, and that the mayor's action in the premises was not binding upon the defendant. It is insisted by the complainant that in this holding the chancellor committed error, for the reason that the powers delegated to the mayor by said resolution were purely administrative, and not legislative.

The following rule is announced by Mr. McQuillin in his valuable work on Municipal Corporations (volume 1, section 382, et seq.):

"The legal conception early obtained that the powers possessed by public and municipal officers 'must be viewed as public trusts, not conferred upon individual members for their own emolument, but for the benefit of the community over which they preside.' Therefore the principle is fundamental and of universal application that public powers conferred upon a municipal corporation and its officers and agents cannot be surrendered or delegated to others. . . . So the power to contract for the erection of public buildings cannot be surrendered to private individuals. . . . In every case where the law imposes a personal duty upon an officer in relation to a matter of public interest, he cannot delegate it to others, as by submitting it to arbitra-

Lotspeich v. Mayor & Aldermen of Morristown.

tion. . . . Such powers belong emphatically to that class of objects which demand the application of the maxim, '*Salus populi supreme est lex;*' and they are to be attained and provided for such appropriate means as the discretion of those who officially represent and act for the municipal corporation may devise from time to time. This discretion can no more be bargained away than the power itself."

Again, at section 383, Mr. McQuillin says:

"So, where the mayor and aldermen must select the sites for public markets, the architect, and plans, and commissioners are required to make purchases and contracts, a resolution appointing the commissions to purchase a site and build a public market is void. So, where certain duties are conferred upon the council and chief engineer of the fire department, they cannot be delegated by ordinance or otherwise, to a fire board. So the determination of the kind of material with which streets shall be paved, or sewers constructed, and the manner and time in which such work shall be done, conferred upon particular officers, boards, or departments, cannot be delegated. So, where the law confers upon the council, in conjunction with the board of education, power to purchase a site for school purposes, such authority cannot be delegated to the board of public works. So, where the organic law vests the power of appointment of an attorney in the council, it cannot be transferred to the mayor by ordinance or otherwise. . . . Nor can the city relieve its officers from discharging their regular duties, as by contracting by ordinance or

Lotspeich v. Mayor & Aldermen of Morristown.

otherwise with another to perform part or all of such duties."

Mr. McQuillin, in distinguishing between discretionary and ministerial powers, at section 384, uses the following language:

"There is a clear distinction to be observed between legislative and ministerial powers. The former cannot be delegated; the latter may. Legislative power implies judgment and discretion on the part of those who confer it.

"Duties required to be performed by ordinance are legislative and cannot be delegated. So the fixing of the time when and within which public work is to be done in a legislative function, and cannot be delegated to the city engineer."

Again, at section 385, Mr. McQuillin says:

"So, where the charter imposes the duty upon the council to determine the manner in which an improvement, as a street, shall be made, such duty cannot be delegated by ordinance to a city officer of the street committee of the council. So the power conferred by charter upon the council 'to erect lamps, and to provide for lighting the city,' and 'to create, alter, and extend lamp districts,' cannot be delegated to a committee of the council, so that the determination of the committee will be final, either as to erecting new lamps or discontinuing those already established."

Again, speaking of the distinction between discretionary and ministerial powers, this author, at section 387, uses the following language:

Lotspeich v. Mayor & Aldermen of Morristown.

"The rule forbidding the delegation of power, stated and illustrated in prior sections, does not apply to the performance of purely ministerial duties. Such duties may be delegated.

"The law has always recognized and emphasized the distinction between instances in which a discretion must be exercised by the officer or department or governing body in which the discretion is vested and the performance of merely ministerial duties by subordinates and agents. Therefore the appointment of agents to carry out the authority of the council is entirely competent and does not violate the rule, '*Delegatus non protest delegare.*' Thus the council may create committees or other bodies to investigate given matters, to procure information, to make reports and recommendations, and not exceed its power in the matter under consideration, but the council alone must finally determine the subject committed to its discretion and judgment. . . . So the council may authorize the mayor to make a contract which the council alone is authorized to make, and afterwards ratify such contract and take action, as in issuing bonds, in pursuance of it. In such cases the mayor merely acts as the instrument or amanuensis of the council. It is through him that the contract is made. The council by ratification finally determines and fulfills the duty imposed by law."

The rule seems to be well settled that, so far as the powers of a municipal corporation are legislative, they rest in the discretion and judgment of the municipal body intrusted with them, and the general rule is that that body cannot delegate or refer the exercise of

Lotspeich v. Mayor & Aldermen of Morristown.

such powers to the judgment of a committee. *Dillard v. Webb*, 55 Ala., 468; *Bibel v. People*, 67 Ill., 172; *Bills v. Goshen*, 117 Ind., 221, 20 N. E., 115, 3 L. R. A., 261; *Koeppen v. Sedalia*, 89 Mo. App., 648; *Hengst v. Cincinnati*, 9 Ohio Dec., 731.

It has been said that the reason for this rule is found in the fact that members of the council are chosen by the people to represent the municipality, charged with a public trust and the faithful performance of their duties; and the public is entitled to the judgment and discretion, in all matters where such elements enter into transactions on behalf of the municipality, of each member of the body upon which authority to act is conferred. *Jewell Belting Co. v. Bertha*, 91 Minn., 9, 97 N. W., 424.

Within the rule that the governing body of a municipality may not delegate its legislative functions to a committee, it has been held that the power to order the construction of sewers cannot be delegated to a sewer committee. Nor can the power to make certain improvements in the sewerage system be delegated to a committee and the city engineer. *People v. McWethy*, 177 Ill. 334, 52 N. E. 479.

It has been held that the council may not delegate the duty of prescribing the width of a proposed sidewalk to the street committee and city engineer. *McCowell v. Bristol*, 89 Va., 652, 16 S. E., 867, 20 L. R. A., 653.

The power to license a particular occupation within the corporate limits, it has been held, cannot be delegated

Lotspeich v. Mayor & Aldermen of Morristown.

by the municipality to the mayor. *State v. Glavin*, 67 Conn., 29, 34 Atl., 708.

It has been held that it is beyond the power of the city council to delegate to the mayor or to any agent the power to sell certain municipal bonds at a price to be fixed according to his discretion. *Blair v. Waco*, 75 Fed., 800, 21 C. C. A., 517.

It has also been held that, where the mayor and council have the power to tax, this power cannot be delegated to the mayor alone. *Johnston v. Macon*, 62 Ga., 645.

Nor can a municipal corporation commit to one of its departments the discretion to revoke or decline to renew a billboard license. *Curran Bill Posting & D. Co. v. Denver*, 47 Colo., 221, 107 Pac., 261, 27 L. R. A. (N. S.), 544.

Neither can it delegate to a committee of officials the power to take steps to prevent the casting of litter into the streets, and to provide for the erection and cleaning of receptacles for such refuse, where it is given the power to provide for the maintenance of clean streets. *People ex rel. Healey v. Clean Street Co.*, 225 Ill., 470, 80 N. E., 298, 9 L. R. A. (N. S.), 455, 116 Am. St. Rep., 156.

In *Whyte v. Mayor and Aldermen of Nashville*, 2 Swan (Tenn.), 364, 365, it was held that the powers conferred upon a municipal corporation must be exercised in conformity with the law of its creation; and hence the corporation of Nashville had no power to delegate to any one or more members of the board of aldermen authority to give notice, to such citizens as they might

Lotspeich v. Mayor & Aldermen of Morristown.

select, to construct footpavements in front of their lots, and, in the event of failure to make such pavements within the time fixed by a by-law of the corporation, to have them made at the expense of the owner of the lot; that this was a power conferred upon the corporation which could not be delegated.

The defendant was incorporated under chapter 103 of the Acts of 1903. By this act all power to contract is vested in the board of mayor and aldermen. There is no provision in the charter authorizing the mayor to execute contracts or to bind the municipality. He is vested with no discretionary powers. The only provision in the act conferring any authority on the mayor is found in section 3 thereof. This section provides that the mayor shall preside at all meetings of the board, to see that all ordinances of the town are duly enforced, and he is vested with the power to call special sessions of the board when he may deem it expedient.

The resolution of July 7th conferred full power on the mayor to enter into the arbitration agreement on behalf of the defendant, and "to take such steps as were necessary to effect a speedy settlement with the complainant for the acquirement of said lot." He, of necessity, had to exercise judgment and discretion in selecting an arbitrator for the city; in agreeing on a third arbitrator; in reducing the frontage of the lot from twenty-five feet to nineteen feet; in contracting for a right of way for the complainant over the city's property; in agreeing to build a wall on the city's property; in agreeing to release the complainant from the payment of taxes and paving assessments; and in agree-

Lotspeich v. Mayor & Aldermen of Morristown.

ing that the award of the arbitrators should be final, and the city should not have the right to appeal therefrom.

A purely ministerial function of a municipality is one as to which nothing is left to discretion; while legislative acts involve the exercise of discretion and judgment. *City of Biddeford v. Yates*, 104 Me., 506, 72 Atl., 335, 15 Ann. Cas., 1091.

We are clearly of the opinion that the powers attempted to be delegated to the mayor by the resolution of July 7th were legislative rather than ministerial. It attempted to confer upon the mayor the power to contract on behalf of the city, by which contract the city was to be bound, when that power is vested alone in its mayor and aldermen under its charter. It vested in the mayor a wide discretion in making said arbitration agreement and in taking such steps as were necessary to acquire the property from complainant. This discretion the mayor exercised in the particulars herein-before enumerated.

We think the powers delegated by said resolution were unlawful, and the chancellor was correct in so holding. His decree is therefore affirmed, with costs.

Henderson Grocer Co. v. Johnson.

HENDERSON GROCERY Co. v. W. R. JOHNSON *et ux:*

(Knoxville. September Term, 1918.)

1. HUSBAND AND WIFE. Property rights. Modification of husband's estate. Statutes.

The husband's common-law estate *jure utoris* has been so materially modified by legislative enactments that only a bare privilege is left to the husband to rent out his wife's land and to collect the rents for the benefit of the family in the capacity of governor of the family and not for himself individually. (*Post*, p. 131.)

Acts cited and construed: Acts 1835-36, 1849-50, 1879; Acts 1913, ch. 26.

Case cited and approved: Ables v. Ables, 86 Tenn., 333.

Code cited and construed: Secs. 4225, 4234, 4239.

2. HUSBAND AND WIFE. Wife's separate property. Rents. Under the Emancipation Act of 1913, a wife has a right to rent out her lands and to collect the rents accruing therefrom. (*Post*, p. 131.)

3. HUSBAND AND WIFE. Wife's separate property. Emancipation act.

Under the Emancipation Act of 1913, fully relieving married women from all disabilities on account of coverture and giving them the same right to acquire, hold, and dispose of realty and personalty as if unmarried, a married woman can hold no separate property as such, and all her property to which she has title is subject to her debts. (*Post*, p. 131.)

Cases cited and approved: Parlow v. Turner, 132 Tenn., 339; Levy v. Davis, 125 Tenn., 349.

4. HUSBAND AND WIFE. Married women. Wife's title to property. Under the Emancipation Act of 1913, a husband had no interest in a

Henderson Grocer Co. v. Johnson.

lot owned by the wife at time of her marriage, and the entire title thereto remained in the wife and might be levied upon and sold by her creditor as her property. (*Post*, pp. 131, 132.)

Case cited and approved: Day v. Burgess, 139 Tenn., 559.

FROM WASHINGTON.

Appeal from the Chancery Court of Washington County.—Hon. HAL. H. HAYNES, Chancellor.

GEO. C. SELLS, for appellant.

DIVINE & QUINN, for appellees.

MR. JUSTICE MCKINNEY delivered the opinion of the Court.

On January 20, 1915, the complainant, Henderson Grocery Company, recovered a judgment before a justice of the peace against the defendants, W. R. Johnson and wife, Queenie Johnson, for \$337.59, upon which judgment execution was issued and levied upon the lot involved in this suit as the property of the defendant Queenie Johnson; and, after being legally condemned, the lot was sold by order of the court and purchased by the complainant. This lot was owned by Mrs. Johnson at the time of her marriage to her co-defendant, W. R. Johnson.

After the time for redeeming said lot had expired, the sheriff executed a deed to complainant to said lot, and, the defendants refusing to surrender possession of same to complainant, the original bill was filed in this cause for the purpose of ejecting the said W. R. Johnson,

Henderson Grocer Co. v. Johnson.

Queenie Johnson, and their tenants from said property.

The defendant Queenie Johnson filed her answer as a cross-bill, asking the court to decree that said condemnation proceeding and the sale made thereunder were null and void, and that the complainant acquired no title to said lot by virtue of its purchase thereunder.

The chancellor dismissed the cross-bill, and decreed in favor of complainant on its original bill, and the cross-complainant has appealed from the decree of the chancellor to this court. Among the errors assigned are the following:

(1) "That defendant W. R. Johnson had a freehold interest in the lot involved, by the common law, by statute, *jure mariti*, and *jure uxoris*, not subject to levy and sale for his debts, on execution at law or otherwise, specifically protected by the law from such levy and sale; and protected from dispossession under any process running as arising out of the debts of the husband."

(2) "That the contingent remainder interest of the wife was not an estate subject to levy at law."

(3) "That, as against her creditors, proceeding at law, the rights and interest and estate of the husband was paramount and dominant, as an estate or right of use for life, *in præsenti*; and any sale, if otherwise valid, only passed to the purchaser a servient and contingent right, conditioned upon the husband predeceasing the wife, or the wife predeceasing the husband when childless; and not effective to disturb in the least the tenure of the husband, as tenant by the courtesy initiate or consummate, or his dominant estate as one of present enjoyment."

Henderson Grocer Co. v. Johnson.

(4) "That, upon marriage of W. R. Johnson to Queenie Johnson, the realty she then owned (that now involved) *ipso facto* became split up into two estates as a matter of law, instead of the one; the fee was divided, the present, dominant user or contingent freehold vesting in the husband, the remainder, a contingent remainder, vesting in the wife, or her original fee diminishing to that estate, lesser than the fee."

(5) "That, there being two estates, after marriage, the levy upon both, and sale of both, as appearing from the levy, order, sale, deed, etc., together for a lump sum, was void, for that each debtor had a right to have his interest sold separately, to the end that each could redeem separately."

We will treat these five assignments of error together as they raise the question as to whether the husband of cross-complainant had an interest in the lot of land in question in this suit. The insistence of the cross-complainant is that, under the common law, the husband, by marriage, took a freehold estate in his wife's lands held as a general estate by inheritance during their joint lives, and possibly, by surtesy, during his life; and that the Acts of 1835-36, 1849-50, and 1879, Shannon's Code, sections 4225, 4234, and 4239, respectively, did not take away or deprive him of this common-law interest in his wife's land, but only modified it. Treating this as true, it remains to be determined whether the Emancipation Act of 1913 (Pub. Acts 1913, chapter 26), annulled or took away this right of the husband and left the wife holding the entire estate in her lands.

Henderson Grocer Co. v. Johnson.

Originally, under this common-law estate in the wife's lands, the husband could dispose of his interest therein; such interest might be sold by his creditors; he was entitled to rent out the land and to collect and appropriate the rents. But by various legislative enactments, as held in *Ables v. Ables*, 86 Tenn., 333, 9 S. W., 692, the common-law estate *jure uxoris* has been so materially modified that only a bare privilege is left to the husband to rent out his wife's lands and to collect the rents for the benefit of the family in the capacity of governor of the family, but for the family and not for himself individually.

And in *Parlow v. Turner*, 132 Tenn., 339, 178 S. W., 766, it was held that, under and by virtue of the act of 1913, the wife had a right to rent out her lands and to collect the rents accruing from same, thus depriving the husband of the last vestige of his common-law estate, *jure uxoris*.

The act of 1913 is very broad and comprehensive, and provides that married women are fully emancipated from all disability on account of coverture, and that the common law as to the disability of married women and its effect on the rights of the property of the wife is totally abrogated, and that marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and do all acts in reference to property which she could lawfully do if she were not married, and that every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy, and

Henderson Grocer Co. v. Johnson

dispose of, all property, real and personal, in possession, and to make any contract in reference to it, and to bind herself personally, and to sue and be sued with all the rights and incidents thereof as if she were not married.

So that, by this act, the *status* of a married woman, with respect to her property, is the same as though she were a *feme sole*, and, as stated in *Levy v. Davis*, 125 Tenn., 349, 142 S. W., 1120:

"An unmarried woman, as a matter of course, can hold no separate estate as such. All her property to which she has title is subject to her debts."

So that we are of the opinion that the husband had no interest in this property, but that the entire title to same was vested in the cross-complainant, and, same having been levied on and sold as her property, the purchaser acquired a good title.

The question of courtesy does not arise in this cause, for the reason that the record does not show that a child has been born of this marriage, but, even if there were issue, under the authority of *Day v. Burgess*, 139 Tenn., 559, 202 S. W., 911, the husband had no vested interest in this property.

The other assignments of error were disposed of orally.

We find no error in the decree of the Chancellor, and it is affirmed, with costs.

Southern Ry. Co. v. State.

SOUTHERN RAILWAY CO. v. THE STATE.

(Knoxville. September Term, 1918.)

1. INDICTMENT AND INFORMATION. Railroads. Conclusion. Obstructing public highway at crossing.

Under the common law, a railroad can be indicted for obstructing a public crossing, but the indictment or presentment must conclude "to the common nuisance." (*Post*, p. 135.)

Cases cited and approved: *State v. Railroad*, 91 Tenn., 445; *L. & N. Railroad Co. v. State*, 40 Tenn., 523; *Gaines v. State*, 75 Tenn., 410.

2. INDICTMENT AND INFORMATION. Proviso. Obstruction of public crossing by a railroad company.

As Shannon's Code, section 6514 et seq. (Acts 1879, chapter 183), applies only to highways within limits of incorporated towns or cities where incorporating laws are repealed or charters forfeited, or the towns have failed to keep an organized board of mayor and aldermen, a presentment thereunder, which fails to show that the highway obstructed is within the act and not excluded by proviso, is insufficient. (*Post*, pp. 135-138.)

Acts cited and construed: Acts 1879, ch. 183.

FROM HAMBLEN.

Appeal from the Circuit Court of Hamblen County.
—HON. JOHN B. HOLLOWAY, Judge.

W. N. HICKEY and SUSONG & BIDDLE, for appellant.

H. M. RANKIN and WM. H. SWIGGART, JR., for the State.

Southern Ry. Co. v. State.

MR. JUSTICE MCKINNEY delivered the opinion of the Court.

At the May term, 1917, of the circuit court of Hamblen county, a presentment was found against the plaintiff in error, the body of which presentment is as follows:

"That the Southern Railway Company on the 9th day of March, 1917, in the State and county aforesaid, did unlawfully, willfully, maliciously and wantonly let its train of cars stand upon and cross the public road in Russellville, Tennessee, Hamblen county, said road leading from Morristown, Tennessee, to Warrensburg, Tennessee, and other points, so as to obstruct and impede public travel, contrary to the statute and against the peace and dignity of the State."

Motion was made and entered to quash said presentment on the following grounds:

(1) "Because it alleged no offense against the laws of Tennessee."

(2) "Because the allegations of the presentment were insufficient to constitute any offense, there being nothing in the presentment to show that said cars obstructed said crossing for an unreasonable length of time so as to amount to a nuisance."

(3) "Because the presentment did not conclude with the words 'to the common nuisance,' or words of equivalent import."

Said motion to quash was overruled by the court, to which action the plaintiff in error duly excepted. The case was then heard, and the jury found the defendant guilty, and a fine of \$10 was entered against it, from which judgment it has appealed to this court and has assigned errors.

Southern Ry. Co. v. State.

We think the motion to quash should have been sustained.

Under the common law a railroad can be indicted for obstructing a public crossing. *State v. Railroad*, 91 Tenn., 445, 19 S. W., 229; *L. & N. Railroad Co. v. State*, 3 Head, 523, 75 Am. Dec., 778.

In which case the indictment must conclude "to the common nuisance." *Gaines v. State*, 7 Lea, 410, 40 Am. Rep., 64; Wharton's Criminal Law (Last Ed.), section 1693.

In the instant case the presentment was drawn and based upon section 6514 of Shannon's Code, which is the first section of chapter 183 of the Acts of 1879.

Said act of 1879, in its entirety, is as follows:

"An act to make it a misdemeanor to obstruct public highways, private ways, streets, alleys, sidewalks, etc.

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, that it shall be a misdemeanor for any person to obstruct the public highways, private ways, streets, alleys, sidewalks, public grounds, commons and ways to burying places, churches or school-houses, and that it shall be an obstruction under this act for any person to ride horseback, hitch horses upon, or drive a wagon, buggy or any vehicle, upon said sidewalks.

"Sec. 2. Be it further enacted, that if any person shall be guilty of any one of the offenses mentioned in the foregoing section of this act shall, upon conviction, pay a fine in an amount not to exceed twenty-five dollars, and may be imprisoned in the county jail at

Southern Ry. Co. v. State.

the discretion of the court, for a period of time of not more than twenty days.

“Sec. 3. Be it further enacted, that this shall apply to all public highways, private ways, recognized as such, by law, streets, alleys, sidewalks, public grounds, commons, and ways to burying places, situated within the limits of any incorporated town or city where the laws incorporating the same has or may hereafter be repealed, or has or may hereafter forfeit their charters, or may fail to keep an organized board of mayor and aldermen; provided, however, it shall not be so construed as to interfere with the regulations and governments of any organized corporation of any town or city.

— “Sec. 4. Be it further enacted, that the board of mayor and aldermen of any incorporated city shall be guilty of a nuisance under the present existing laws of the State, if they permit any of the foregoing offenses named in the first section of this act, within the corporate limits.

“Sec. 5. Be it further enacted, that no person under this act shall be amenable to the first section of the same by reason of their obstructing any street, cross-street or alley in any town with material for building or repairing buildings or grounds attached to the same; provided, that the same is not obstructed an unreasonable length of time; provided, not more than one-half of the passway shall be obstructed at any one time.

“Sec. 6. Be it further enacted, that the circuit and criminal judges of this State shall give this act in charge to the grand juries, and that this act take effect from

Southern Ry. Co. v. State.

and after its passage, the public welfare requiring it."

It will be observed that the first section does not say whether it applies to the State, or to cities or municipalities within the State, and, without some qualifying clause, or expressed limitation, it would undoubtedly refer to the highways and streets within the entire State. But the third section does qualify and limit the first section, and says it shall apply to highways, streets, etc.: (1) Within the limits of any incorporated town or city where the law incorporating the same has or may hereafter be repealed, (2) or has or may hereafter forfeit their charters, (3) or may fail to keep an organized board of mayor and aldermen. This third section then concludes with the proviso that it shall not be so construed as to interfere with the governments of any organized corporation of any town or city.

You have to consider sections 1 and 3 in their relation to each other to determine the legislative intent. The proviso of the third section and the terms of the fourth section indicate that the legislature realized that organized municipal corporations had authority and jurisdiction of their streets, sidewalks, etc., and did not wish to interfere with such right further than to provide that the board of mayor and aldermen should be guilty of a nuisance when they, under such authority, permitted its streets, sidewalks, etc., to become obstructed.

So far as obstructing the highways, roads, etc., of the State, outside of the incorporated cities and towns, they were aware that the offender was subject to indictment under the common law, and so the act in question was intended to apply in the three instances set forth in the

Southern Ry. Co. v. State.

third section of the act not provided for by either of the remedies above set forth. Take for example the case of a street, in an incorporated town that has no organized board of mayor and aldermen, becoming obstructed: If the offender is indicted under the common law, he would defend on the ground that the street was within an incorporated town, over which the corporation had exclusive authority and control; there is no corporate organization to punish the offender, and the result would be that he would go unpunished. To meet such a case and to extend the law so as to provide a remedy whereby all persons who obstruct highways can be called to account the act in question was passed. This appears to us to be what the Legislature had in mind.

Now, there is no allegation in the presentment involved in this case that would bring it within the third section of this act. It was evidently drawn under the first section of the act upon the theory that the act applied to all of the roads, highways, and streets within the State.

It results that the judgment of the circuit court is reversed, and the presentment is quashed.

Trammell v. Griffin.

H. K. TRAMMELL *v.* A. W. GRIFFIN *et al.:*

(Knoxville. September Term, 1918.)

1. MUNICIPAL CORPORATIONS. Mayor. Eligibility. "Voter."

Under charter of City of Jellico embodied in Acts 1093, chapter 336, sections 6, 9, 13, declaring no one eligible to office of mayor unless he shall be a citizen of the state and city, and a voter in the city, and shall have resided in the city for six months next preceding the election, the term "voter" means one having the qualifications entitling him to vote, and not one who has registered as a voter. (*Post*, pp. 140-143.)

Acts cited and construed: Acts 1903, ch. 336.

Constitution cited and construed: Art. 4, sec. 1.

2. MUNICIPAL CORPORATIONS. Mayor. Eligibility. Registration as voter.

Thompson-Shannon's Code, sections 1012, 1014, relating to the registration of voters, as authorized by Constitution, article 4, section 1, do not prescribe qualifications of electors, but were enacted to regulate the exercise of the elective franchise, and registration is not necessary to make one a voter in a city so as to be eligible under its charter (Acts 1903, chapter 336, sections 6, 9, 19), to election as mayor. (*Post*, pp. 143-145.)

Acts cited and construed: Acts 1903, ch. 336, secs. 6, 9, 13.

Cases cited and distinguished: Moore *v.* Sharp, 98 Tenn., 491; State *v.* Weaver, 122 Tenn., 198.

Codes cited and construed: Secs. 1210, 1214 (T.-S.).

Constitution cited and construed: Sec. 1, art. 4.

*On the question of registration as a condition of right to vote, see note in 25 L. R. A., 480.

Trammell v. Griffin.

FROM CAMPBELL.

ERROR to the Criminal and Law Court of Campbell County.—Hon. Xen Hicks, Judge.

E. H. Powers and L. D. Smith, for appellant.

John Jennings, Jr., and L. H. Carlock, for appellees.

Mr. Justice Green delivered the opinion of the Court.

This suit challenges the eligibility of defendant Griffin to hold the office of mayor of Jellico, to which office he was elected in January, 1918. From a judgment in favor of the defendant contestant has appealed in error.

The proposition of plaintiff in error is that Griffin was not a qualified voter of the city of Jellico at the time of his election to the office of mayor, and it is urged that Griffin is accordingly incapable of holding said office by reason of certain provisions of the charter of that city.

The election was held January 5, 1918, Griffin did not register in August, 1917, or at the supplemental registration held twenty days prior to the election. He did register in August, 1915, and had paid his poll tax for 1917. He has been a *bona-fide* resident and citizen of Jellico since 1914.

The present charter of the city of Jellico is embodied in chapter 336 of the Acts of 1903. Section 6 of that act is as follows:

Trammell v. Griffin.

"Be it further enacted, that the officers of the city of Jellico to be chosen by the people shall be a mayor and six (6) aldermen, who shall constitute the city council, each of whom shall be a citizen of and voter in said city; said mayor and board of aldermen shall be chosen by the voters of said city every two (2) years. No person shall be eligible to the office of mayor or alderman unless he has been for six months, and then be a *bona-fide* resident of the city. Any of said officers removing from the city shall thereby vacate his said office."

Section 13 of the act is in these words:

"Be it further enacted, that the mayor shall hold his office for two years, and until his successor shall be elected and qualified. No person shall be elected mayor who is not at the time of his election a citizen of the State of Tennessee, and has not been for six months, and is not thus a *bona-fide* citizen of and voter in said city."

Does the word "voter," as used in said charter, mean a person having the qualifications entitling him to vote, or does it mean such a person who has registered and thus lawfully evidenced his right to vote—in other words, a registered voter? This is the question for determination.

Section 9 of chapter 336 of the Acts of 1903 is in these words:

"Be it further enacted, that the election for mayor and board of aldermen of said city of Jellico shall be held by the marshal of the corporation, aided by two clerks only, and three judges, all of whom shall be legal voters in said city, on the first Saturday in January of every two years, after giving ten days' notice. The

Trammell v. Griffin.

voters shall vote by ballot and under such rules and regulations as the board of mayor and aldermen shall prescribe as to the place, house, etc., of voting by ordinance. The officers of the city thus chosen shall go into office on the third Saturday in January, to hold office for two years, or until their successors are elected and qualified. The following shall be the qualifications for voting in city elections:

“1. He shall be qualified to vote for State and county officers.

“2. He shall have resided for six months next preceding the election within the city limits, or shall be a male and a *bona-fide* owner of real estate within the city limits.

“3. A voter’s residence is hereby defined as the place at which he habitually sleeps.”

From the foregoing it appears that a qualified voter in State and county elections becomes a qualified voter in Jellico city elections if he reside in that municipality, or own property therein. Residence or ownership of property in that city are the only additional and peculiar qualifications of voters in Jellico.

The contention of plaintiff in error is that registration is a condition precedent to voting in those parts of the State to which our registration laws apply, and that an elector cannot be described as a qualified voter unless he is registered.

This argument is plausible, but it leads into grave constitutional difficulties.

Section 1 of article 4 of the Constitution of Tennessee is in these words:

Trammell v. Griffin.

"Every male person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county wherein he may offer his vote for six months, next preceding the day of election, shall be entitled to vote for members of the General Assembly and other civil officers for the county or district in which he resides; and there shall be no qualification attached to the right of suffrage, except that each voter shall give to the judges of election where he offers to vote, satisfactory evidence that he has paid the poll taxes assessed against him, for such preceding period as the legislature shall prescribe, and at such time as may be prescribed by law; without which his vote cannot be received. And all male citizens of the State shall be subject to the payment of poll taxes and to the performance of military duty, within such ages as may be prescribed by law. The General Assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box."

The Constitution forbids that any qualification be attached to the right of suffrage, except that the legislature may prescribe poll tax regulations.

This court has repeatedly held that our registration laws did not impose an additional qualification on the right of suffrage.

The court has quoted and approved a statement from Cooley on Constitutional Limitations, page 601, that:

"The provision for a registry deprives no one of his right, but is only a reasonable regulation under

Trammell v. Griffin.

which the right may be exercised." *Moore v. Sharp*, 98 Tenn., 491, 499, 41 S. W., 587, 589.

Into later case, the court said: "The registration laws of the State do not prescribe qualifications of electors, but were enacted for the purpose of regulating the exercise of the elective franchise, and are authorized by the concluding clause of section 1, art. 4, of the Constitution, ordaining that the General Assembly shall have power to enact laws to secure the freedom of elections and the purity of the ballot box." *State v. Weaver*, 122 Tenn., 198, 122 S. W., 465.

In Ruling Case Law it is said that: "The theory upon which registration laws may be supported is that they do not impair or abridge the elector's privilege, but merely regulate its exercise by requiring evidence of the right. . . . The requirement of registration does not add new qualification, unless such voter is deprived of the right to prove himself to be an elector, or, as it has been held, is denied the right to register and vote at any time prior to the closing of the polls on election day." 9 R. C. L., p. 1036.

So it is obvious, from the authorities quoted, that we cannot properly speak of registration as a qualification for voting in State and county elections. One qualified to vote in those elections is likewise a qualified voter in Jellico, provided he resides there, or owns property there. It follows that registration is not necessary to make one a "voter in said city."

An inspection of our election and registration laws demonstrates that the word "voter" is used therein in

Trammell v. Griffin.

the sense of one who is qualified to vote, and not in the sense of a registered voter.

Thus, in section 1210 of Thompson's Shannon's Code, it is made a misdemeanor for any registrar of voters to willfully refuse "to register any qualified voter."

In section 1214, Thompson's Shannon's Code, prescribing the oath for registrars of election, it is provided that they shall swear that they will not "knowingly register, or allow to be registered, any person not a legally qualified voter," and that they will not prevent "any person from registering who is a legally qualified voter."

In these and other sections of the Code, the word "voter" is used to describe a person entitled to register, and not a person actually registered. Indeed, it appears from the sections quoted persons are referred to as "qualified voters" before registration.

Such being the general meaning given to the word "voter" by the legislature, we think it was used in this sense in the act incorporating the city of Jellico, and that the defendant was a voter in said city within the meaning of that statute at the time of his election, although he had not actually registered so as to be able to participate in that election.

It is not necessary to discuss other questions in the case.

For the reasons stated, the judgment of the trial court will be affirmed.

C., N. O. & T. P. Ry. Co. v. Sharp.

CINCINNATI, N. O. & T. P. Ry. Co. v. MINNIE SHARP,

(Knoxville, September Term, 1918.)

1. EASEMENTS. Ways. Over railroad right of way.

Whether a railroad company acquired its right of way by condemnation or deed is no ground for distinction in determining whether a prescriptive way can be acquired over such right of way, for, regardless of the mode of acquisition, a railroad company, under Shannon's Code, section 2413, holds property only for railroad purposes. (*Post. p. 150.*)

Code cited and construed: Sec. 2413(S.).

2. EASEMENTS. Rights of way. Prescriptive easements.

As a railroad holds its right of way for public purposes, a prescriptive way over such right of way cannot be acquired. (*Post, pp. 150-152.*)

Cases cited and approved: Railroad Co. v. Fort, 3 Tenn. Civ. App., 723; Magill v. Railroad, 2 Tenn. Civ. App., 656; Railroad Co. v. Telegraph Co., 101 Tenn., 62; L. & N. Railroad Co. v. Hagan, 141 Ky., 20; L. & N. Railroad Co. v. Childers, 155 Ky., 652.

3. EASEMENTS. Prescriptive ways. Property in possession of lessee.

Where a railroad company was in possession of a right of way as lessee, no prescriptive way over such right of way could be acquired, for the law will not presume a grant from the apparent acquiescence of one who could not have made it. (*Post, pp. 152, 153.*)

Case cited and approved: McKinney v. Duncan, 121 Tenn., 269.

Case cited and distinguished: Sanders v. Simpson, 97 Tenn., 385

4. EASEMENTS. Right of way. Permissive use.

Where there was nothing to show that persons who used a path over a railroad right of way for about twenty-five years, or the public generally, did so under any claim of right adverse to the owners of the right of way, no prescriptive easement resulted. (*Post, pp. 153, 154.*)

C., N. O. & T. P. Ry. Co. v. Sharp.

Cases cited and approved: *Sharp v. Mynatt*, 69 Tenn., 375; *McKinney v. Duncan*, 121 Tenn., 265.

5. APPEAL AND ERROR. Change of. Theory on appeal.

Where plaintiff was injured when she stumbled over lumber placed on a railroad right of way in such a manner that it obstructed an established path thereon, *held* that, where plaintiff relied on a prescriptive way, she could not on appeal change to the theory that a landowner, who expressly or by implication invites the public to come upon his land or use it as a pathway, cannot permit a snare or danger to exist thereon which results in injury to the person who accepts the invitation. (*Post*, pp. 154, 155.)

Case cited and approved: *Connor v. Frierson*, 98 Tenn., 183.

Case cited and distinguished: *Clapp v. La Grill*, 103 Tenn., 170.

FROM MORGAN.

Appeal from the Criminal Court of Morgan County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—Hon. Xen Hicks, Judge.

CARR & MORRIS, for appellant.

DAVIS, DAVIS & JONES, W. Y. BOSWELL and D. W. BYRGE, for appellee.

MR. JUSTICE MCKINNEY delivered the opinion of the Court.

This is a suit for damages for personal injuries. A verdict of \$1,000 was rendered by the jury, upon which judgment was entered, and on appeal this judgment was

C., N. O. & T. P. Ry. Co. v. Sharp.

affirmed by the court of civil appeals, and the case has been brought here by certiorari.

The residence of the defendant in error was in about ten feet of the right of way of the railroad operated by the plaintiff in error, and was located in a deep hollow in the town of Oakdale, and went by the name of the Southern Hotel. This building was erected about the year 1891, and for some time thereafter was used as a saloon, and later as a negro tenement, and has maintained somewhat of an unsavory reputation.

In getting from said building to the public road, the defendant in error traveled a winding path across the right of way of said railroad company. Said path was very steep and rough. This building has been owned by one James Wilson for about seven years, and the defendant in error had lived in said house for something over a year prior to the time of the accident complained of. Since the erection of said building those occupying the building, as well as people going to and from same, have used this pathway across the railroad right of way, and this has been something like twenty-five years.

At the time of the injury the defendant in error was employed as a house servant by a Mrs. Waddell, receiving as wages \$2.50 per week and her meals. She left her home early every morning and usually returned after night. There was another way she could have traveled without crossing said right of way, but it was about two hundred steps further.

In the spring of 1916, the railroad company began the erection of a large water tank on its right of way and near to the residence of the defendant in error.

C., N. O. & T. P. Ry. Co. v. Sharp.

For several days prior to the accident it had been unloading lumber and gravel on its right of way, in front of the residence of the defendant in error, but not upon or across said pathway; said lumber, gravel, and other material to be used in the erection of said water tank.

On the morning of the 3d day of May, 1916, defendant in error went to her work as usual, and there was no obstruction upon or across said path at that time. When she returned that night it was very dark, so much so that she could scarcely see anything at all, and in passing along said pathway she stumbled over some lumber that had been placed across said pathway during the day, and was precipitated down the steep embankment, in front of her house, and over which said pathway extends, resulting in serious injury, to recover damages for which this action was brought. The declaration contains the following averment, upon which the right to recover in this case is predicated:

"The plaintiff alleges and avers that the roads which lead to and from her residence are both public and private roads leading to and from her residence; that said roads have been used by the public generally for a period of more than twenty years, and that the defendant knew that said roads were being used by the public generally, and by those who have from time to time occupied the property known as the Southern Hotel; and plaintiff alleges and avers that the defendant has for more than twenty years acquiesced in the public using said road as a public road, and in the use of said road by the people who have occupied said house known as the Southern Hotel; said occupants using said roads

C., N. O. & T. P. Ry. Co. v. Sharp.

in order to gain ingress and egress to and from said property."

The theory of the plaintiff below was that she and the public generally had acquired a prescriptive right in this pathway, and that the defendant, by obstructing same, became liable for the injury resulting therefrom.

The circuit judge charged the jury that the public could not acquire any prescriptive right in such right of way, where the railroad company acquired same by grant or by condemnation proceedings, but that the public could acquire such right when the property had been acquired by warranty deed conveying the fee, and where the provision of the instrument did not limit the estate transferred to railroad purposes.

The attorneys have not cited any authority in support of this holding of the learned circuit judge, and we have been unable, either upon principle or authority, to sustain such a distinction. Railroads in this state cannot hold real property for other than railroad purposes.

Shannon's Code, section 2413, provides that railroads shall have power to purchase and hold, or to receive by gift, or to acquire by condemnation, real estate for corporation purposes; so that, regardless of the manner in which it is acquired, the railroad only holds it for railroad purposes, and in the numerous authorities which we have examined we do not find a single case where such a distinction is drawn, as was done by the learned circuit judge in this case.

There seem to be two lines of authorities on this question, one holding that such prescriptive right can be acquired, and the other that such right cannot be

C., N. O. & T. P. Ry. Co. v. Sharp.

acquired, in the railroad right of way; and in those cases holding such right can be acquired, the courts say that such use will be held to be permissive, and not adverse, in the absence of strong evidence to the contrary. The great weight of authority seems to be opposed to such right, and such has been the holding of our courts. *Railroad Co. v. Fort*, 3 Tenn. Civ. App., 723; *Magill v. Railroad*, 2 Tenn. Civ. App., 656; *Railroad Co. v. Telegraph Co.*, 101 Tenn., 62, 46 S. W., 571, 41 L. R. A., 403.

The principle upon which the courts hold that such right cannot be acquired in the right of way of the railroad is stated in *L. & N. Railroad Co. v. Hagan*, 141 Ky., 20, 131 S. W., 1018, 35 L. R. A. (N. S.), 189, which was a case where a passway was claimed along and across the right of way, and had been used without question for thirty or thirty-five years. The court, denying the right to such passway, said:

"There is necessarily a distinction between a railroad right of way and the property of a private person as to the presumption of a grant. A private person holds his land for his private purposes. The railroad holds its right of way for public purposes. When a railroad has taken a right of way, either by condemnation or by purchase, on the ground that it is necessary for the business of the road, it is not presumed that it has granted to others property that was acquired for public purposes. It is a matter of common knowledge that in this country persons walk over and along railroad tracks at many points, and that the railroads permit this so long as it does interfere with their business. But this

C., N. O. & T. P. Ry. Co. v. Sharp.

merely permissive use of their rights of way and tracks gives such persons no legal right to a passway over them."

In a note to this case the authorities on this question are fully annotated. It will be noticed that in this case no distinction is made between property purchased and property condemned by the railroad.

The latest case we have found on this question is that of *L. & N. Railroad Co. v. Childers*, 155 Ky., 652, 160 S. W., 260, 48 L. R. A. (N. S.), 903, and note. There the public had used a pathway across the railroad right of way for more than thirty years in going to and from a hotel on the opposite side of the track. It was held that there was no prescriptive right. The record does not show what kind of a title the railroad had to the property.

However, the distinction made by the learned circuit judge does not arise in this case, for the reason that the plaintiff in error does not own the fee in this right of way, and the court was in error in so instructing the jury. The deed referred to was executed to the trustees of the Cincinnati Southern Railway, and the agreement of the parties, found on page 52 of the transcript, shows that the plaintiff in error is the lessee of the Cincinnati Southern Railway, and, since said lease is not made a part of the record, we do not know what interest plaintiff in error acquired under said lease, but we do know that it could not be a fee-simple estate.

In *McKinney v. Duncan*, 121 Tenn., 269, 118 S. W., 684, the court quotes approvingly from *Sanders v. Simpson*, 97 Tenn., 385, 37 S. W., 195, as follows:

C., N. O. & T. P. Ry. Co. v. Sharp.

"To give user this effect [prescriptive right] it must be uninterrupted in the land of another by the acquiescence of the owner for a period of at least twenty years under an adverse claim of right, while all persons concerned in the estate in or out of which it is derived are free from disability to resist it, and are seized of the same in fee and in possession during the requisite period. Where all these circumstances concur, it raises *prima-facie* evidence of a right to such easement acquired by a grant which is now lost. Thus there may be two distinct estates, and the owner of the one may have claimed and exercised the right of passing over the other for a period of time ordinarily requisite to give a right of way, but would fail thereby to create a presumption of a grant, if the servient estate during that period, or any considerable part of it, had belonged to a minor, or was in possession of a lessee, or one under a disability, like a married woman. The law would never presume a grant from the apparent acquiescence of one who could not have made it, or had no right to oppose the user from which it was sought to be inferred."

However, treating the plaintiff in error as an individual, we do not find any evidence in the record to support the claim of the defendant in error, for there is absolutely nothing to show that the use of this pathway, either by defendant in error, or by any one else, or by the public generally, was under any claim or right adverse to the owners of the property. We simply have a record showing that this pathway has been used for about twenty-five years by people in going to

C., N. O, & T. P. Ry. Co. v. Sharp.

and from said Southern Hotel building, and this is not sufficient under our authorities to even establish a prescriptive right as between private property holders. *Sharp v. Mynatt*, 1 Lea, 375; *McKinney v. Duncan*, 121 Tenn., 265, 118 S. W., 683.

We are therefore of the opinion that no prescriptive right had been acquired by the defendant in error, or by the public in general, in this pathway, and the circuit judge should have sustained the motion of the plaintiff in error for a directed verdict. The defendant in error was a mere licensee, and the plaintiff in error was under no obligation to keep said pathway unobstructed.

In disposing of the case in the court of civil appeals, that court held that it was not necessary for it to decide the question of prescriptive right, for the reason that the principle of the "trap" doctrine applied, and justified the recovery adjudged in the circuit court. In support of this doctrine the court of civil appeals quotes from the case of *Clapp v. La Grill*, 103 Tenn., 170, 52 S. W. 135, as follows:

"We think it clear that when the owner of land, expressly or by implication, invites the public, or third person, to come upon his land or use it as a passway, he cannot permit a snare or danger to exist thereon which results in injury to the person who accepts the invitation, and who, at the time, is exercising ordinary care, without being answerable for the injury."

We do not think the principle of the "trap" doctrine is involved in this case. No such issue was tendered in the pleadings, or raised on the trial in the lower court, or suggested by any of the assignments of error, or

C., N. O. & T. P. Ry. Co. v. Sharp.

even hinted at in the brief of the able attorneys representing the defendant in error.

The "trap" doctrine theory, as will be seen from a perusal of the case of *Clapp v. La Grill*, supra, is based upon the use of the property by invitation of the owner, while the doctrine of prescriptive right is based upon a right or use adverse to the owner. *Connor v. Frierson*, 98 Tenn., 183, 38 S. W., 1031; 14 Cyc., 1150. And in order to create a prescriptive right or easement the use must not be permissive. 14 Cyc., 1151.

So that the two doctrines are absolutely inconsistent and cannot stand together. The defendant in error alleged in her declaration that she used this pathway under a claim of right and adversely to the plaintiff in error. Therefore she cannot come now and say that she was an invitee, and, for that reason, the plaintiff in error owed her and the public in general the duty of keeping said pathway unobstructed.

We are therefore of the opinion that the judgment of the court of civil appeals and of the circuit court is erroneous, the same is reversed, and the suit of the defendant in error is dismissed, and she will pay the costs accrued in the several courts.

Hunter v. Swadley.

JOHN W. HUNTER *v.* R. A. SWADLEY *et al.*

(Knoxville. September Term, 1918.)

1. RELIGIOUS SOCIETIES. Unincorporated religious association. Actions against.

An unincorporated religious association should plead, and be impleaded through its trustees, although it is doubtless true that, where the interests of the trustees are adverse to the association, the association may be impleaded by naming its members. (*Post.* p. 160.)

Cases cited and approved: Wilson *v.* M. E. Zion Church, 138 Tenn., 398. Headrick *v.* Ruble, 78 Tenn., 15.

2. JUDGMENT. Parties. Conclusiveness. Waiver of defects.

Where a bill against an unincorporated religious association named as defendants trustees who had gone out of office shortly before, but the association defended the suit employing counsel, held, that the judgment was binding against the association; the case being one of misnomer which was waived unless raised by plea in abatement. (*Post*, pp. 160-163.)

3. APPEAL AND ERROR. Review. Law of case.

A former judgment against an unincorporated religious association held on subsequent appeal conclusive as to the authority of the association to incur the indebtedness sued for. (*Post*, p. 163.)

4. RELIGIOUS SOCIETIES. Unincorporated societies. Property. Indebtedness.

Where an unincorporated religious association sold its property and delivered the proceeds to another religious society which invested the same in new property, held, that one having a claim against the association, while not entitled to enforce it against the property, might reach the proceeds of the property in the hands of the new society. (*Post*, pp. 163, 164.)

Cases cited and approved: Solinsky *v.* Lincoln Savings Bank, 85 Tenn., 368; Williamson *v.* Williams, 79 Tenn., 355.

Hunter v. Swadley.

5. RELIGIOUS SOCIETIES. Incorporation. Essentials.

Under General Incorporation Act of 1875 Thompson's Shannon's Code, section 2026), declaring that, after the certificate of the Secretary of State and the *fac simile* of the great seal shall be registered in the register's office of the county wherein the principal office of the company is situated, the formation of the company as a body politic shall be complete, a religious society which attempted to incorporate is not a corporation until the certificate is recorded in the office of the register, and, until such recordation, is not a *de facto* corporation and may be treated as an unincorporated association by one who did not recognize its corporate character. (*Post*, pp. 164-167.)

Acts cited and construed: Acts 1875; Acts 1877, ch. 23.

Cases cited and approved: Brewer v. State, 75 Tenn., 682; Shields v. Clifton Hill Land Co., 94 Tenn., 123; Railroad v. Sneed, 99 Tenn., 1; Carpenter v. Frazier, 102 Tenn., 462; Merriman v. Magiveny, 59 Tenn., 494. Railroad Co. v. Johnson, 67 Tenn., 332; State v. Butler, 83 Tenn., 104; Manufacturing Co. v. Vertress, 72 Tenn., 75; Tennessee Automatic Lighting Co. v. Massey (Ch. App.), 56 S. W., 35; Ingle System Co. v. Norris & Hall, 132 Tenn., 472.

Cases cited and distinguished: Anderson v. Railroad, 91 Tenn., 44; Collier v. Railroad, 113 Tenn., 96.

6. MORTGAGES. Priority. Right to.

Where plaintiff was entitled to subject to the payment of his debt, incurred by the original church, funds which a second church received from the first, held that, where the second church did not complete its corporate organization until after complainant filed his bill, complainant was entitled to satisfaction out of its property prior to mortgages executed by the second church as a corporation, though such mortgages were valid as against the church; he having fixed a prior lien by attachment. (*Post*, pp. 167, 168.)

Hunter v. Swadley.

FROM KNOX

Appeal from the Chancery Court of Knox County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—Hon. HAL. H. HAYNES, Chancellor.

E. C. REEVES and Cox & TAYLOR, for appellant. —

LEE F. MILLER and DIVINE & GUINN, for appellees.

MR. JUSTICE GREEN delivered the opinion of the Court.

This suit is brought to collect from the Central Baptist Church, of Johnson City, hereafter called the "new church," a judgment alleged to have been obtained by C. N. Brown & Co., for the use of complainant Hunter, against the Missionary Baptist Church, or First Baptist Church, an unincorporated religious association, formerly existing at Johnson City, hereafter called the "old church."

The chancellor was of opinion that complainant was not entitled to satisfy said judgment out of the assets of the new church. The court of civil appeals was of contrary opinion, reversed the decree of the chancellor, and directed the subjection of the property of the new church to said judgment. Complainant attached the property of the latter organization.

Hunter v. Swadley.

The complainant appears to have once been affiliated with the old church, and this controversy has engendered much feeling. The case has been prepared and presented elaborately, with learning and ability quite disproportionate to the amount involved.

Numerous questions are raised, and the case will be more readily understood by stating a portion of the facts in connection with the disposition of each point.

Two general questions are to be determined: First, whether complainant obtained a valid judgment against the old Baptist church; and, second, whether the property of the new Baptist church can be taken for the payment of this judgment.

The original bill of C. N. Brown & Co., for the use of this complainant, was filed against R. R. Bayless, George P. Crouch, and T. G. Galloway, as trustees of the old church, and against J. W. Houtz and George P. Crouch, as a sales committee of that church. It averred liability on the part of the church to complainants therein for services as real estate agents in an effort to sell certain property belonging to the church. An answer was filed to this bill, many defenses interposed, and proof taken. The bill was dismissed by the chancellor, but his decree was reversed by the court of civil appeals, and the decree of the court of civil appeals was affirmed by this court, and on September 26, 1912, a decree was rendered in this court in favor of the complainants against R. R. Bayless, George P. Crouch, and T. G. Galloway, as trustees, and J. W. Houtz and George P. Crouch, as a sales committee of said church, for the sum of \$587.80 and costs.

Hunter v. Swadley.

It is first contended by the defendants herein that this was not a valid judgment against the old church. It is said that two of the parties named as trustees of said church were not trustees thereof when the suit was brought, and it is furthermore argued that it is necessary to make the members of a voluntary association defendants in order to secure a judgment binding against the property of such an association.

We have recently had occasion to consider the character of an unincorporated religious association. We have held that such an association, under the statutes, is a legal entity for certain purposes and within a limited sphere enjoys *quasi-corporate* existence. We have said such an association might sue and be sued in respect to the few contracts it was authorized to make, and that "such an association should plead and be impleaded through its trustees." *Wilson v. M. E. Zion Church*, 138 Tenn., 398, 198 S. W., 244.

It is doubtless true, where the interests of the trustees are adverse to those of the association, or perhaps under other circumstances, the association may be impleaded by naming its members as defendants. *Headrick v. Ruble*, 78 Tenn. (10 Lea), 15. But it can be reached through its trustees.

We do not think that jurisdiction of the old church was acquired by naming as parties defendant Houtz and Crouch as a sales committee.

Prior to the filing of the original suit, Bayless, Crouch, and Galloway were the trustees of the old church. It appears, however, from the minutes of that organization, that Crouch and Bayless resigned October

Hunter v. Swadley.

6, 1909. The original bill was filed November 4, 1909. So, at the time the first suit was brought, Crouch and Bayless were not actually trustees.

Although the church was not, therefore, properly impleaded in such a way as to bind its property, had a suitable defense been interposed, we think that the subsequent procedure of the church precluded any objections to the judgment against it on this account.

Beyond all question, the church treated this suit as one against it and as an effort to hold its property. While the authority of the trustees and the sales committee to bind the church for this agent's commission was denied, nevertheless the church answered the original bill through these very defendants, named as its representatives.

On December 1st, at a congregational meeting, the following resolution was passed:

"Moved and carried that the following recommendations from the board of deacons be adopted, viz.:

"That, whereas, C. N. Brown & Co., by J. W. Hunter, has filed a bill in court in an endeavor to extort the sum of \$500 from the church, on the claim of commission:

"We, therefore, recommend that the officers of the church be empowered to employ counsel to defend said cause."

In pursuance of this resolution, counsel were employed, and the suit was vigorously defended, and proof herein shows that this defense was made by the church. As a matter of fact, the trustees of the old

Hunter v. Swadley.

church, at the time the original suit was brought, were Galloway, Vines, and Peoples. The complainants named Galloway, Crouch, and Bayless.

The case then is merely one of misnomer—a suing of a defendant by a wrong name. Such a matter is one of abatement, only, and, if the defendant misnamed makes actual appearance and defends on the merits he cannot later take advantage of the misnomer, and the judgment, though rendered according to the style of the suit, is binding against the real defendant.

“Suing a defendant by a wrong name is a matter of abatement only and will not avoid a judgment against him if he has been actually served. An actual appearance is the equivalent of personal service within the meaning of this rule. Hence, where a party is sued by a wrong name and he appears to the suit and does not plead the misnomer in abatement, and judgment is rendered against him in the erroneous name, execution may be issued upon it in that name and levied upon the property and effects of the real defendant. Even a corporation cannot take advantage of its being incorrectly named as a party defendant in an action otherwise than by plea in abatement. Failing to make such a plea, a judgment against it cannot be avoided because of a misnomer.” 15 R. C. L., p. 599; Clark & Marshall on Corporations, vol. 1, p. 154; Black on Judgments, section 213.

It follows, for the reasons stated, that the original judgment against the parties named as trustees of the First Baptist Church, or Missionary Baptist Church, bound the property of that organization, inasmuch as it

Hunter v. Swadley.

entered appearance, waived the misnomer, and defended on the merits.

All questions as to the authority of this organization to incur such an indebtedness, and its liability for said indebtedness, are foreclosed by the decree in the former case, inasmuch as the old church was before the court, and these questions there adjudicated. We will not go into such matters again.

During the pendency of this suit against the old church, the Central Baptist Church, or the new church, was organized, but not at first incorporated. It was composed, principally, of members of the old church and of the members of another church, known as the Roan Street Baptist Church. The old church voluntarily turned over all of its property to the trustees of the new one, and the latter sold this property to innocent purchaser for value, for about \$13,000. This sum was invested by the new church in other property.

The complainant is not entitled to follow the identical property, or real estate, of the old church in the hands of these innocent purchasers. Complainant is, however, entitled to reach the proceeds of this property in the hands of the new church, the donee of said voluntary conveyance. *Solinsky v. Lincoln Savings Bank*, 85 Tenn., 368, 4 S. W., 836; *Wilkinson v. Williams*, 79 Tenn. (11 Lea), 355.

In the fall of 1912, the new church endeavored to incorporate under the name of the "Central Baptist Church, of Johnson City." Application was made for a charter, other steps taken, and the trustees of the new

Hunter v. Swadley.

church undertook to transfer all its property to the corporation.

All this was done some two years before the present bill was filed. The corporation was not named as a party to this suit, and it is urged that the suit must fail, inasmuch as complainant has not named as defendant the party owning and in possession of the property sought herein to be reached.

The complainant replies that there was no valid organization of the corporation and that it did not become a legal entity with which he had to reckon. Complainant therefore ignored the corporation, except to refer to it, and named as defendants to this bill the trustees of the new church prior to the attempted incorporation and sought to reach the property as in their hands.

Application for the charter of the Central Baptist Church was made September 3, 1912, and this application acknowledged and probated, in Washington county, on the same day. The certificate of the Secretary of State and the great seal were attached September 20, 1912. The certificate and *fac simile* of the seal, however, were not registered in the office of the register of Washington county until December 11, 1914, several days after the bill herein was filed. It is said for the complainant that, until the certificate and seal were duly registered, he was not bound to recognize the organization as a legal corporate entity. We think this contention must be upheld.

In the General Incorporation Act of 1875 appears this provision, carried into Thompson's Shannon's Code at section 2026:

Hunter v. Swadley.

"The said instrument, when probated as hereinafter provided [section 2542], with application, probates, and certificates, is to be registered in the county where the principal office of the company is situated, and also registered in the office of the Secretary of State; and a certificate of registration given by the Secretary of State, under the great seal of the State, shall when registered in the register's office of said county, with the *fac simile* of said seal, complete the formation of the company as a body politic; and the validity of the same in any legal proceedings shall not be collaterally questioned."

This section of the Code was first construed in *Brewer v. State*, 75 Tenn. (7 Lea), 682. In that case the defendant was indicted for violation of the Four Mile Law (Laws 1877, chapter 23), and proved that the certificate and *fac simile* of the seal of State attached to the charter of the incorporated institution, near which his offense was said to have been committed, had not been registered in the county at the time of the alleged offense. The court held that, under such facts, the institution "was not then an incorporated institution in the sense of the statute," and the defendant was therefore not guilty of the offense charged.

This case has been cited and approved in *Anderson v. Railroad*, 91 Tenn., 44, 17 S. W., 803; *Shields v. Clifton, Hill Land Co.*, 94 Tenn., 123, 28 S. W., 668, 26 L. R. A., 509, 45 Am. St. Rep., 700; *Railroad v. Sneed*, 99 Tenn., 1, 41 S. W., 364, 47 S. W., 89; *Carpenter v. Frazier*, 102 Tenn., 462, 52 S. W., 858; *Collier v. Railroad*, 113 Tenn., 96, 83 S. W., 155; and other cases.

Hunter v. Swadley.

In *Anderson v. Railroad*, supra, it was said, speaking of the provisions as to registration of the charter and of the certificate and seal: "When these conditions of existence have been fulfilled as required, and not before, can the corporation rely upon its exemption from collateral attack."

In *Collier v. Railroad*, supra, it is said:

"The things which the statute requires to be done in order to complete the organization of the corporation as a body politic are mandatory and essential, and, unless they are all substantially done, the charter is void and the incorporation is incomplete."

The very language of the statute which declares that, "after" these various requirements are complied with, the corporation is complete, "and the validity of the same shall not be in any legal proceeding collaterally questioned," necessitates the implication that the validity of the organization is open to collateral attack prior to the observance of such conditions.

It is insisted that the Central Baptist Church was a *de facto* corporation, at least, and as such its existence could not be collaterally questioned, nor its validity challenged, by any one except the State. Many authorities are cited for this proposition. Some Tennessee cases are mentioned by counsel; but, when understood they are not in point. We do not think *Brewer v. State*, supra, has ever been modified by this court, and under the act of 1875 an organization does not become a *de facto* corporation until there has been a compliance with the formalities just mentioned—not, at least, as against one who has not dealt with it as a corporation.

Hunter v. Swadley.

Merriman v. Magiveny, 59 Tenn. (12 Heisk.), 494, *Railroad Co. v. Johnson*, 8 Baxt. (67 Tenn.), 332, *State v. Butler*, 83 Tenn. (15 Lea), 104, and *Manufacturing Co. v. Vertrees*, 72 Tenn. (4 Lea), 75, did not consider corporations chartered under the act of 1875, containing the provisions above quoted.

Tennessee Automatic Lighting Co. v. Massey (Ch. App.), 56 S. W., 35, was a case where those undertaking to collaterally question the legal organization of the corporation had themselves in business dealings recognized it as a corporation.

The principle upon which *Tennessee Automatic Lightning Co. v. Massey*, property, rests, and which is sound, is stated by this court in a later case to be that a private person who enters into a contract with a purported corporation thereby admits the existence of the corporation and is estopped later to deny such corporate existence. *Ingle System Co. v. Norris & Hall*, 132 Tenn., 472, 178 S. W., 1113.

Most of the older Tennessee cases relied on by defendants really rest on this principle.

The Central Baptist Church made three mortgages of its property, assuming to act as a corporation, prior to the registration of the certificate of the Secretary of State and the seal. The corporate organization was perfected after this bill was filed, and for this and other reasons the mortgages are valid as against the church.

We think, however, the debt of the complainant must have satisfaction out of the church property prior to these mortgages. This complainant never in any way

Hunter v. Swadley.

recognized the corporate existence of the Central Baptist Church. As to him it had no corporate existence at the time of his suit and was unable to acquire the legal title to this property. Therefore, as to this complainant, the legal title did not pass by the deed of the trustees to the corporation, nor pass by the corporate deed to the trustees of these mortgages. As to complainant the legal title stood in the name of the trustees of the Central Baptist Church. To the extent that the property of the old church had gone into this organization, namely, about \$13,000, the property of the Central Baptist Church was liable to the satisfaction of complainant's judgment. We think he fixed a prior lien thereon by his attachment herein.

It results that there is no error in the decree of the court of civil appeals, and the same will be affirmed, with costs. And, unless said judgment is paid within sixty days, the clerk of the court will sell said property, in the manner provided by law, for the satisfaction thereof.

Ford v. Cottrell.

W. B. FORD v. ELLENDER COTTRELL *et al.*
ELLENDER COTTRELL v. W. B. FORD.*

(Knoxville. September Term, 1918.)

1. WILLS. "Demonstrative Legacy." "Specific Legacy."

Under will bequeathing to a sister the rents of a house and lot during her natural life, house and lot to be sold at sister's death and proceeds given to an orphan's home, the legacy to the home was not "demonstrative," but "specific." (*Post*, pp. 175-178.)

Case cited and approved: *Manlove v. Gault*, 2 Tenn. Ch. App., 410.

Case cited and distinguished: *American Trust Co. v. Balfour*, 138 Tenn., 385.

2. WILLS. Date of taking effect.

Will does not take effect until death of testator. (*Post*, p. 178.)

3. WILLS. Sale of property. "Ademption." Specific legacy.

Since, under will bequeathing to a sister rents of a house and lot during her natural life, house and lot to be sold at sister's death and proceeds given to an orphan's home, a sale of the house and lot during testatrix's lifetime worked an "ademption" as to sister, it also worked an ademption as to the home; the legacy to the sister taking precedence and priority in time and right to that of the home. (*Post*, pp. 179, 180.)

4. WILLS. Ademption. Effect.

There being an ademption of legacies by testatrix's sale of house and lot in her lifetime, the proceeds constitute a part of general personal estate, and should, along with other personality, be applied to payment of debts and general legacies under the terms of the will. (*Post*, pp. 180-181.)

*On disposal, loss or destruction of subject matter, or payment of debt, as ademption of specific legacy or devise, see note in 40 L. R. A. (N. S.), 542.

Ford v. Cottrell.

Cases cited and approved: American Trust Co. v. Balfour, 133 Tenn., 385; McNaughton v. McNaughton, 34 N. Y., 201; Lang v. Vaughn, 137 Ga., 671; Manlove v. Gaut, 2 Ch. App., 410; Amentano v. Downs, 170 N. Y., 388.

5. WILLS. Specific legacies. Rights of legatees. Subrogation.

Where specific legacies are consumed by payment of debts, legatees are entitled by way of subrogation to the rights of creditors to go upon the undevised real estate for reimbursement to the extent that the personality specifically bequeathed was encroached upon or consumed. (*Post*, p. 181.)

Cases cited and approved: Alexander v. Miller, 54 Tenn., 65; Hope v. Wilkinson, 82 Tenn., 21; Douglass v. Baber, 83 Tenn., 651; Overton v. Lea, 108 Tenn., 505.

6. EXECUTORS AND ADMINISTRATORS. Payment of legacies. Debts.

A general legacy of a certain amount of money is not to be paid until all debts are paid out of the personal estate, the latter being the primary fund or property for the payment of debts. (*Post*, p. 181.)

7. WILLS. General Legacy. Payment from undevised realty.

A general legacy of a certain amount of money cannot be paid out of proceeds from undevised real estate, unless there is an intention to do so expressly declared or clearly inferred from the language of the will. (*Post*, p. 181.)

Case cited and approved: Evans v. Beaumont, 84 Tenn., 713.

8. WILLS. Property undevised. Right of sole heir.

Where will providing for payment of debts and for a number of general pecuniary legacies contained no residuary clause and made no mention of real estate in question, testator died intestate as to such realty and it descended to her sole heir at law. (*Post*, pp. 181-183.)

9. WILLS. Payment of general pecuniary legacies. Property subject.
Under will providing for payment of debts and personal expenses and of several general pecuniary legacies, held, that there was no intention plainly expressed and reasonably implied that lega-

Ford v. Cottrell.

cies should be provided for otherwise than from personal estate, so that court erred in holding that realty as to which testatrix died intestate was subject to payment of such legacies. (*Post.* pp. 181-183.)

10. EXECUTORS AND ADMINISTRATORS. Payment of debts. Resort to realty.

Realty as to which testatrix died intestate could not be subjected to payment of debts, where personality was sufficient for that purpose; a contrary intention not appearing from the will. (*Post,* pp. 181-183.)

FROM KNOX.

Appeal from the Chancery Court of Knox County.
HON. WILL D. WRIGHT, Chancellor.

W. B. FORD and JOHNSON & Cox, for appellant.

GREEN, WEBB & TATE and R. A. BROWN, for appellee.

MR. THAD. A. COX, Special Judge, delivered the opinion of the Court.

These consolidated causes involve the construction of the will of Matilda Ford, deceased. W. B. Ford is the executor of the said Matilda Ford, the latter having died at her home in Knox county, Tenn., on June 23, 1917, seized and possessed of a personal estate valued at about \$8,000, and a house and lot on Rutledge Pike, in the suburbs of Knoxville; the last will and testament being dated August 8, 1913.

By the terms of the will, testator provided for the payment of her debts and for a number of legacies. She

Ford v. Cottrell.

did not dispose of the house and lot referred to. There is no residuary clause in the will, and she therefore died intestate as to the house and lot and it descended to her sister, Ellender Cottrell, who is her sole heir at law.

The first bill filed herein was that of Ellender Cottrell against W. B. Ford, executor, on October 16, 1917, to eject said executor from the house and lot on Rutledge Pike, above referred to. The bill of W. B. Ford, executor, was filed November 21, 1917, against Ellender Cottrell and all the legatees mentioned in the will, asking for a construction of the will.

After providing for the payment of all debts and funeral expenses out of any money that testator might die seized and possessed of, or might first come into the hands of the executor, the will then directs the payment of nine general pecuniary legacies, five of which were to as many different relatives of the testator, amounting to \$500 each, and four of which were to as many different mission boards of the Southern Baptist Convention, of \$1,000 each, thus making a total of \$6,500.

All of the household and kitchen furniture was also bequeathed to Ellender Cottrell, and, in addition, she is bequeathed the rents of one house and lot in South Knoxville, during her natural life, "she to receive said rents after the taxes, insurance and repairs have been paid for out of the first rents received each year in which said taxes, insurance and repairs are due," and, at her death, the will provides the house and lot is to be sold and the proceeds given to the Baptist's Orphans' Home at Nashville, Ten-

Ford v. Cottrell.

The will then directs that certain monuments be erected by the executor, and provides, in connection therewith:

"That necessary funds for same, if not sufficient in the hands of my executor, be reserved out of the bequests herein provided, in proportionate amounts, to erect same, before said bequests are distributed to the parties herein named."

The master's report shows the personal assets of the deceased to be \$8,228.50, and debts \$967.25, and the total amount of the legacies and bequests to be \$7,000. The master reports a bequest to Hazen Wallace of \$500, which does not appear in the will in the record before us. In addition to the liabilities above mentioned, the master reports \$300 attorney's fees allowed by the Chancellor to counsel for the executor, and whatever sum may be expended for the erection of the monument mentioned in the will, together with the costs of this cause and another small item for stenographer's fees.

The house and lot, the rents from which were bequeathed to the said Ellender Cottrell, as above set forth under the second paragraph of the will, and the proceeds from the sale of which, at the death of Ellender Cottrell, were bequeathed to the Baptist Orphans' Home at Nashville, Tenn., was sold during the life of the testator for the sum of \$2,000, \$100 of which the testator collected and spent, or retained, during her life, and for the balance of the purchase money seventy-six notes were executed by the purchasers, payable to the order of the said Matilda Ford, amounting to \$25 each, due and payable on the 1st day of each month,

Ford v. Cottrell.

with interest from date. The proceeds from this property, consisting of these notes, is included in the assets enumerated above by the master as coming into the hands of the executor.

The questions which therefore arise are:

(1) Is the board of managers, Tennessee Baptist Orphans' Home, entitled to the proceeds derived from the sale of the house and lot in question, under the bequest in paragraph 2 of the will, as above stated, or was there an ademption by the sale of said property by the testator before her death?

(2) If said board is entitled to these proceeds, and if an ademption of the legacy was not effected by the sale of said property, then there will not be sufficient funds to pay the debts of the testator and satisfy the money legacies provided for in the will; and the further question then arises as to whether or not the house and lot on Rutledge Pike should be sold and the proceeds subjected to the payment of said legacies.

These are the questions involved, and it is not necessary to review the pleadings showing the filing of the various bills, answers, cross-bills, etc.; but it is sufficient to state that all of the parties interested are before the court and contending for constructions favorable to their respective interests.

The Chancellor held that the legacy to the Baptist Orphans' Home at Nashville (which will hereinafter be referred to as the board), under the second, paragraph of the will, is a demonstrative legacy, and that the sale of the real estate by the testator did not work an ademption of the same, and that the board is entitled to

Ford v. Cottrell.

the proceeds of said sale; and he expressly held, on the other hand, that there was an ademption in so far as the legacy to Ellender Cottrell of the rents from the property during the life of the latter was concerned. Recovery was awarded against the executor in favor of the board at Nashville for the amount which came into the hands of the executor as the proceeds from the sale of said property, amounting to \$1,900. The Chancellor also held that the said Matilda Ford died intestate as to the house and lot on Rutledge Pike and decreed that said property be sold and the proceeds from the same be applied upon the payment of the debts and legacies provided for in the will, there being a deficiency of personal assets to pay said debts and legacies; the Chancellor holding that said real estate was the primary property out of which said debts and legacies should be paid and satisfied. He dismissed the bill filed by Ellender Cottrell against the executor, with costs.

The first question to be considered is, therefore, whether or not the decree of the Chancellor was correct in adjudging that the sale of the house and lot, referred to in the second paragraph of the will, operated as an ademption of the legacy of the rents to Ellender Cottrell during her lifetime, and adjudging that the same act did not operate as an ademption of the legacy to the Baptist Orphans' Home, of the proceeds from the sale of said property at the death of the said Ellender Cottrell. The Chancellor having taken the view that the legacy was what is termed a "demonstrative legacy," and that the proceeds were in existence at the

Ford v. Cottrell.

death of the testator, he held that the sale of the property during her lifetime did not operate to deprive the Baptist board of its right to same, as hereinabove stated.

In the first place, we do not think that the legacy in question was a demonstrative legacy, but that it was a specific legacy.

"To make a legacy demonstrative it must appear to have been the intention of the testator to give the amount to the legatee in any event and not merely to charge the gift upon one fund alone; for, in the latter case, the legacy would be extinguished by the extinguishment of the fund." Pritchard on Wills, section 461.

Again, for definition as to when an "ademption" takes place: "An ademption of a legacy is effected when by some act of the testator its subject-matter has ceased to exist in the form in which it is described in the will so that on his death there is nothing answering the description to be given to the beneficiary." Cyc., vol. 40, p. 1914.

In the last-named work, we further find the following: "A sale of personal property bequeathed, or a conveyance of land bequeathed, causes an ademption, although it would be possible to follow the proceeds of such sale, and the same result may follow from a sale, or conveyance, of property upon which a specific legacy is charged. Where part of the property bequeathed or devised is sold or conveyed the legacy is deemed *pro tanto*, but not revoked as to the remainder of the property." Id., vol. 40, pp. 1919, 1920.

Ford v. Cottrell.

Mr. Pritchard, in his work on Wills, further says: "Whatever, therefore, puts an end to a specific claim so that at the testator's death it does not form a part of his estate is an ademption of the legacy. If the testator never had the article purported to be specifically bequeathed, or if he had it at the time of making the will, but it has afterwards been consumed or used or lost by death or destruction, etc., . . . the legatee's rights to it are destroyed." Id., section 462.

In *American Trust Co. v. Balfour*, 138 Tenn., 385, 388, 198 S. W., 70 (L. R. A., 1918D, 536), this court said: "A 'specific legacy' is a bequest of a specific article or particular fund or designated part of the testator's estate, distinguished from all others of the same nature"—citing *Manlove v. Gaut*, 2 Tenn. Ch. App., 410, 445; 4 Words and Phrases (Second Series), p. 651.

And, in said case of *Manlove v. Gaut*, the bequest was to the proceeds of a designated storehouse, which might be left after the payment of a mortgage thereon, and the court of chancery appeals held it to be a specific bequest. It is said, also, in the case of *American Trust Co. v. Balfour*, as to an ademption of a specific legacy, that:

It is "the extinction, *alienation*, withdrawal, or satisfaction of the legacy, by some act of the testator by which an intention to revoke is indicated; the doing of some act with regard to the subject-matter which interferes with the operation of the will."

The language of the will in question in the case before us is as follows:

Ford v. Cottrell.

"Second. I will and bequeath unto my sister Ellen Cottrell, five hundred (500) dollars in money and all the household and kitchen furniture that I may own at the time of my death, also the rents of one house and lot in South Knoxville, during her natural life, she to receive said rents after the taxes, insurance and repairs have been paid out of the first rents received each year in which said taxes, insurance and repairs are due, and at the death of my sister, Ellen Cottrell, I direct that said house and lot be sold and the proceeds be given to the Baptist Orphans' Home at Nashville, Tennessee."

This, we think, is a "specific legacy." The property bequeathed is specifically named and mentioned: First, to Ellender Cottrell, the rents during her natural life, from the house and lot in South Knoxville, after the payment of taxes, insurance, etc. Second, to the board at Nashville, the proceeds from a sale of said property, said sale to be made at the death of Ellender Cottrell. The will, of course, did not take effect until the death of the testator. At the death of the latter, the specific property in question had been sold by her and was not, therefore, in existence. The fact that had said property remained in existence as contemplated by the will, and had, at a later, indefinite date (that is, at the death of Ellender Cottrell), been sold and the board at Nashville have taken under the will the proceeds of such sale, could not operate to create a right to the proceeds of a sale of the property made before the death of the testator and to vest by reason thereof and in direct opposition and antagonism to the provisions of the will.

Ford v. Cottrell.

In the second place, while we think the Chancellor was correct in holding that there was an ademption of the legacy to Ellender Cottrell, we think he was in error in holding that there was no ademption also of the legacy to the board of orphans' home at Nashville. The holding of the Chancellor in this regard, we think, is inconsistent as a matter of legal effect. If there was an ademption as to one, there was an ademption as to the other, because the legacy to the Baptist Board was not to take effect until the death of Ellender Cottrell. The intent and purpose of the testator to bequeath to the orphans' home was no stronger than the intent and purpose to bequeath to Ellender Cottrell; in fact, it was secondary in point of time; and the legal effect of the Chancellor's decree is that the act of the testator was to deprive the one and not deprive the other, and, by the taking from the one who was of first and primary consideration in her will, the bequest to the other, which was of secondary consideration, was accelerated. Such an intent is not only not manifest by the provisions of the will, but is expressly contrary to it. This is shown by the fact that the bequest to the board at Nashville was not to take effect until the death of Ellender Cottrell. Her legacy in the same property took precedence and priority in time and right to that of the board. The fact that the proceeds from the property were in existence at the death of the testator could not operate to entitle the board thereto, when, by the terms of the will itself, it was not to have said proceeds until the death of Ellender Cottrell. As a test, let us suppose, instead of this bequest, there had

Ford v. Cottrell.

been a devise of the realty to Ellender Cottrell for life, and at her death remainder to the board at Nashville? If the property had been sold by the testator during her life, could there be any question as to the cutting off of interest under the will in both the life tenant and the remainderman? Again, the fact that the testator collected the \$100 of the purchase money, and applied it to her own use negatives any intention to effect such a result as was held by the Chancellor.

We therefore hold that, by the sale of this property by the testator during her lifetime, there was an ademption of the legacies provided for in the second paragraph of the will, both to Ellender Cottrell during her life as to the rents, and at her death to the board at Nashville to the proceeds of a sale at that time of the property in question. The proceeds from this property, consisting of the notes for deferred purchase money, constitute a part of the general personal estate of the testator in the hands of the executor, and should, along with the other personal property, be applied to the payment of the debts and general legacies under the terms of the will. See *American Trust Co. v. Belfour*, supra; *McNaughton v. McNaughton*, 34 N. Y., 201; *Lang v. Vaughn*, 137 Ga., 671, 74 S. E., 270, 40 L. R. A. (N. S.), 542, and note, Ann. Cas., 1913B, 52; *Manlove v. Gaut*, 2 Ch. App., 410, 445; *Ametrano v. Downs*, 170 N. Y., 388, 63 N. E., 340, 58 L. R. A., 719, 88 Am. St. Rep., 671.

The second question is as to whether or not the Chancellor was correct in decreeing a general sale of the house and lot on Rutledge Pike.

Ford v. Cottrell.

We think the Chancellor was also in error in this.

Where specific legacies are bequeathed and are consumed by the payment of debts of the testator, the legatees are entitled, by way of subrogation, to the rights of creditors, to go upon the undevised real estate for reimbursement to the extent that the personalty specifically bequeathed was encroached upon, or consumed. *Alexander v. Miller*, 7 Heisk., 65; *Hope v. Wilkinson*, 14 Lea, 21, 52 Am. Rep., 149; *Douglass v. Baber*, 15 Lea, 651; *Overton v. Lea*, 108 Tenn., 505, 68 S. W., 250.

But where a legacy is a general one, of a certain amount of money, it is not to be paid until all the debts are paid out of the personal estate, the latter being the primary fund or property for the payment of the debts, and it cannot be chargeable to, or paid out of the proceeds from, undevised real estate, unless there is an intention to do so, expressly declared or clearly inferred from the language of the will. *Evans v. Beaumont*, 16 Lea, 713.

In the case before us, the first item of the will provides as follows: "I direct that all my debts and funeral expenses be paid out of any money that I may die seized and possessed of, or may first come into the hands of my executor."

Then follows the general pecuniary bequests. After that comes the direction that monuments be erected, providing that, if there are not sufficient funds, the same be taken from the general pecuniary legacies. There is nothing said about the house and lot on Rut-

Ford v. Cottrell.

ledge Pike. The testator died intestate as to this property, and it therefore descended to her sole heir at law, Ellender Cottrell, and could not and should not be sold, under the facts of this case, except for the payment of debts in case of a deficiency of personal property for the payment of same. As shown by the master's report, the personal estate is much greater than the amount of the indebtedness. In fact, it would appear that the personal estate will be sufficient to pay all of the debts of the testator and, in addition, discharge the general pecuniary legacies provided for in the will.

The legacies in the will in question were and are general in their nature. There is no intention, either plainly expressed or reasonably to be implied, from the terms of the will, that the same are to be provided for otherwise than from the personal estate. The legacies should be paid out of the personal estate and not out of the real estate. We think the Chancellor erred in holding that the house and lot on Rutledge Pike constituted the primary property out of which the debts and legacies should be paid, and in ordering a sale of said property and dismissing the bill of Ellender Cottrell at her cost.

We have examined the authorities to which we have been referred by counsel for the executor and the Mission Boards and Baptist Orphans' Home Board, at Nashville, but do not regard them as applicable to, or controlling, the questions involved in this case.

For the reasons and to the extent herein stated, the decree of the Chancellor is reversed.

Ford v. Cottrell.

All of the costs of the consolidated causes will be paid by the executor out of the assets of the estate in his hands, as a part of the debts of the estate, and the cause is remanded for such further proceedings as may be necessary; same to be had in accordance with this opinion.

Taylor v. Blackwell.

GEORGE D. TAYLOR *et al.* v. W. P. BLACKWELL *et al.*

(Knoxville, September Term, 1918.)

1. JUDGMENT. Conclusiveness. Person promoting defense.

A prior grantee of a defendant in ejectment was not bound by the judgment, under Acts 1851-52, chapter 152 (Thompson's Shannon's Code, section 5000), although he was present and was allowed to control the defense as fully as if he and not his grantor had been the defendant. (*Post*, pp. 192, 193.)

Acts cited and construed: Acts 1851-52, ch. 152.

Case cited and distinguished: Boles v. Smith, 37 Tenn., 106.

Code cited and construed: Sec. 5000 (T.-S.).

Cases cited and approved: Chamberlain v. Fox Coal & Coke Co., 92 Tenn., 14; Cope v. Payne, 111 Tenn., 128; Hillman v. Chester, 59 Tenn., 34; Boro v. Harris, 81 Tenn., 36.

2. TENANCY IN COMMON. Adverse possession.

Where the possession of a tenant in common was open and notorious and he cultivated for the statutory period, removed practically all the merchantable timber, sold some fifteen tracts off of the land, deeds being recorded in the register's office, and never made nor was asked for an accounting, the possession was adverse, and the right of the other tenants was barred. (*Post*, pp. 193-196.)

Cases cited and approved: Hubbard v. Wood's Lessee, 33 Tenn., 279; Saunders v. Hackney, 78 Tenn., 203; Morelock v. Bernard, 83 Tenn., 169; Coal Creek Min., etc., Co. v. Ross, 80 Tenn., 1; King v. Rowan, 57 Tenn., 675.

FROM CARTER.

*The question of presumption of ouster of one tenant in common from long-continued, undisturbed possession of another, is discussed in a note in 10 L. R. A. (N. S.), 185.

Taylor v. Blackwell.

**Appeal from the Chancery Court of Carter County.—
Hon. HAL H. HAYNES, Chancellor.**

C. C. COLLINS, for appellant.

ALLEN & CLARK and J. N. EDENS, for appellees.

MR. JUSTICE HALL delivered the opinion of the Court.

This is an ejectment suit brought by the complainants to recover certain lands mentioned and described in the bill, for a partition of said lands, and for an accounting for waste.

Complainants claim title to the lands involved under grant 27025 issued by the State of Tennessee to Alfred W. Taylor and C. M. Gourley on August 8, 1849, for five thousand acres, situated in the Second and Third civil districts of Carter county, Tenn.

The defendant, J. L. Blackwell, claims title to said lands under two grants issued by the State of Tennessee, one to W. P. Blackwell and Z. C. Campbell on December 15, 1884, being No. 40990, and another issued to James Whitehead on November 20, 1882, being No. 40928. These two grants call for two hundred acres each, and the lands embraced in them lie within the boundaries of the Taylor and Gourley grant.

It is conceded by the defendant Blackwell that, the grants under which he claims title being younger than that under which complainants claim, complainants have the superior title, unless he has perfected his title by adverse possession for more than seven years next

Taylor v. Blackwell.

before the filing of the bill by complainants. This he claims he has done.

The record discloses that in January, 1891, one C. N. Wilcox and complainants, Wilcox claiming to have acquired by purchase the undivided one-half interest of C. M. Gourley in the lands embraced in the Taylor and Gourley grant, filed their bill in the chancery court of Carter county against W. P. Blackwell, the father of the defendant J. L. Blackwell, W. A. Waycaster, and J. B. Range, in which they alleged the title to the lands in dispute to be in them, basing their title upon the Taylor and Gourley grant; and further alleging that the defendants named in said bill were claiming title to said lands under the Blackwell and Campbell grant and the Whitehead grant, and had taken possession of said lands under said grants. The bill sought a recovery of said lands from the defendants, it being alleged that complainants were entitled to immediate possession of the same.

W. P. Blackwell answered this bill, denying complainants' title to said lands, averring title in himself and his vendees, and admitting that he and his vendees, were in possession, and pleaded and relied on his claim of adverse possession of said lands for more than seven years as perfecting his title.

The cause was finally heard by the chancellor, who rendered a decree in said cause, adjudging that complainants had title to the whole of said lands embraced in the Taylor and Gourley grant, and that the Whitehead grant and the Blackwell and Campbell grant were clouds upon their title, and that defendants had not

Taylor v. Blackwell.

perfected title by adverse possession of the lands embraced in said grants.

An appeal was prayed, granted, and perfected from this decree, by W. P. Blackwell, to the court of chancery appeals sitting at Knoxville, and by that court the chancellor's decree was modified to the extent of holding that the complainant, C. N. Wilcox, was not entitled, as against the defendant, W. P. Blackwell, to recover more than three-sevenths of the one-half undivided interest of the Gourley interest in said lands, and the bill was dismissed as to the remaining four-sevenths interest, the decree of the court of chancery appeals being rendered on October 20, 1896. An appeal was prosecuted from said decree to the supreme court, where said decree was affirmed on September 18, 1897.

The defendant, J. L. Blackwell, was not a party to the suit of C. N. Wilcox and complainants against W. P. Blackwell and others. It appears, however, that before the bill in said cause was filed, J. L. Blackwell acquired title to said lands by deeds duly executed, and which were of record in the register's office of Carter county. James P. Whitehead conveyed the lands embraced in what is known as the Whitehead grant to J. L. Blackwell on February 1, 1888, which was about three years before the bill of C. N. Wilcox and complainants was filed.

On December 23, 1890, which was a few days before the bill of Wilcox and complainants was filed, W. P. Blackwell, by deed conveyed to J. L. Blackwell the lands embraced in both the Whitehead grant and the Blackwell and Campbell grant under a single boundary. This

Taylor v. Blackwell.

deed was duly recorded on December 26, 1890. W. P. Blackwell, however, only owned an undivided one-half interest in the Blackwell and Campbell grant at the time of said conveyance. Z. C. Campbell, who owned the other undivided one-half interest in said grant, conveyed by deed to J. L. Blackwell said interest on January 4, 1893. Campbell was not made a party to the suit of Wilcox and complainants against W. P. Blackwell and others. J. L. Blackwell immediately went into possession of said lands under the deed executed to him by his father, W. P. Blackwell, and was in possession of them at the time the bill in the pending cause was filed.

The present bill was filed by complainants, who are the heirs at law of Alfred W. Taylor, deceased, against W. P. Blackwell, James L. Blackwell, and W. H. Nelson, the latter having acquired by purchase the interest formerly owned by C. N. Wilcox in the Taylor and Gourley grant, and various other defendants to whom J. L. Blackwell had conveyed portions of the lands embraced in the Whitehead and Blackwell and Campbell grants, claiming title under the Taylor and Gourley grant, which was in issue in the former suit of Wilcox and complainants against W. P. Blackwell and others, and seeks to recover said lands of the defendant, J. L. Blackwell.

The defendants, W. P. Blackwell and James L. Blackwell, answered the bill. Both denied that complainants have any title to the lands embraced in the Whitehead grant and the Blackwell and Campbell grant; and the answer averred that the defendant, J. L. Blackwell,

Taylor v. Blackwell.

was the owner of said lands under the conveyances hereinbefore mentioned. The answer further averred that the defendant J. L. Blackwell had been in open, notorious, peaceable, and adverse possession of all of said lands since said conveyances, having a large portion of said lands cleared and inclosed by fence; had erected houses thereon, and had sold the timber therefrom, as well as a portion of the lands to various vendees. The defendant J. L. Blackwell expressly pleaded and relied upon said adverse possession for more than seven years as perfecting his title to said land.

The complainants allege in their bill that the decree in the cause of Wilcox and complainants against W. P. Blackwell and others settled and fixed the interests of the parties in and to said lands, and that though the defendant J. L. Blackwell was not made a party to that suit, he is bound by said decree as fully as if he had been made a party, because he employed an attorney to defend said suit on behalf of his father, W. P. Blackwell, and when the same had been decided against him by the chancellor, he procured the cause to be appealed to to the court of chancery appeals, and procured a bond to be made, which perfected said appeal to that court, and otherwise actively participated in the defense of said suit, and that he was estopped upon the further ground that he had violated the injunction granted in said cause.

The bill further alleged that said defendant could not rely on the statute of limitations to perfect his title, because, under the decree rendered in the cause of Wilcox and complainants against W. P. Blackwell and

Taylor v. Blackwell.

others, he was adjudged to be a tenant in common with Wilcox and complainants in said lands; that his possession thereafter was one as a tenant in common, and was for and on behalf of his cotenant, and therefore the statute did not run in his favor, and, further, that he was estopped to make any claim to the title decreed to complainants in said former litigation.

The defendant J. L. Blackwell answered the bill, denying that he was in any way bound by the decree rendered in the cause of Wilcox and complainants against W. P. Blackwell and others, because he was not a party to said suit, and that the injunction issued in said cause in no way restrained him from remaining in possession of said lands which had been acquired by him before the bringing of said suit, and he denied that he was estopped by reason of his participation in the defense of said suit brought against his father, W. P. Blackwell.

Upon the issues thus presented and the proof taken, the cause was heard by the chancellor on July 14, 1911, and a decree was rendered, adjudging, in effect, that the litigation in the cause of Wilcox and complainants against W. P. Blackwell and others was for the purpose of determining the title to said lands, and that it was adjudged in that cause that the complainants were the owners of an undivided one-half interest in the lands in controversy, viz. that covered by the Whitehead grant and Blackwell and Campbell grant; and that C. N. Wilcox was the owner of three-seveths of the undivided one-half interest of C. M. Gourley in said lands, and that the defendant W. P. Blackwell was the owner of

Taylor v. Blackwell.

the remaining four-sevenths of the Gourley undivided one-half interest; that the defendant J. L. Blackwell was bound by said decree, being estopped by his conduct in connection with that of his father, W. P. Blackwell, and his participation in the defense of said suit, though not a party thereto; that the defendant J. L. Blackwell could not, after the decree in said former litigation, hold adversely to his cotenants without actual notice to them, or its equivalent, and for a sufficient length of time to vest the title to said lands in him by virtue of said adverse possession, which was not shown. A writ of possession was awarded the complainants to put them in possession of their undivided one-half interest in said lands along with the defendants J. L. Blackwell and W. H. Nelson, who were adjudged to be cotenants with them, the lands being decreed to belong one-half to complainants, eight twenty-eighths to the defendant, J. L. Blackwell, and six-twenty-eighths to the defendant W. H. Nelson.

The cause was also referred to the master for a report from the proof on file and any additional proof that might be taken as to damages for timber cut and removed from said lands by the defendant J. L. Blackwell, and commissioners were appointed to partition the lands among the parties in accordance with their interests as fixed by said decree.

Report was made by the master as to the damage for timber cut and removed from said lands, to which both complainants and the defendant excepted. These exceptions were sustained, and the report was set aside and this branch of the cause was re-referred to the

Taylor v. Blackwell.

master, who again made report to which defendants excepted. These exceptions were overruled by the chancellor, and judgment was rendered against the defendant James L. Blackwell, for the value of the timber cut and removed.

The commissioners appointed to partition the lands made their report, which was excepted to by the defendant Blackwell. These exceptions being overruled, their report was also confirmed. The defendant Blackwell has brought the cause to this court by appeal, and has assigned errors upon the decree.

By the first error assigned it is insisted that the chancellor erred in adjudging that the defendant J. L. Blackwell was bound by the decree in the cause of Wilcox and complainants against W. P. Blackwell and others, and that by his conduct in participating in the defense of said suit, he was estopped from questioning said decree and the interests of the parties as fixed therein, though not a party to said suit.

We are of the opinion that the contention of the defendant J. L. Blackwell, made in this assignment of error, is well taken.

It is provided by chapter 152 of the Acts of 1851-52 (Thompson-Shannon's Code, section 5000), that a judgment in ejectment is conclusive upon the party against whom it is recovered, not under disability at the time of the recovery, and all persons claiming under him by title accruing after the commencement of the action.

In *Boles v. Smith*, 5 Sneed, 106, 107, it was held that: By this statute the judgment is made conclusive only "upon the party against whom" it was rendered, and

Taylor v. Blackwell.

those "claiming from, through, or under such party, by title accruing after the commencement of such action."

Therefore, where the action is brought against a tenant and the plaintiff was successful and was put in possession of the land, the judgment is not a bar against a subsequent action by the landlord who was not a party to the suit, although he was present and was allowed to control the defense as fully as if he, and not the tenant, had been the defendant.

In the case of *Chamberlain v. Fox Coal & Coke Co.*, 92 Tenn., 14, 20 S. W., 345, it was held that a judgment against one's employee is not binding upon his employer, although the latter knew of the existence of the suit and assisted the employee in its defense by the employment of counsel and otherwise.

In *Cope v. Payne*, 111 Tenn., 128, 76 S. W., 820, 102 Am. St. Rep., 746, it was held that only parties and their privies are precluded by adjudgment in a matter of private right, and whenever an action of unlawful entry and detainer was brought against the tenant, in which the landlord was not a party, the landlord was not bound by the judgment, although he knew of the pendency of the action.

To the same effect is the holding of the court in *Hillman v. Chester*, 12 Heisk., 34-39; *Boro v. Harris*, 13 Lea, 36-44.

The next question presented by the assignments of error for determination is whether or not the possession of the defendant J. L. Blackwell of the lands in controversy, after the rendition of the decree in the cause of Wilcox and complainants against W. P. Blackwell and

Taylor v. Blackwell.

others, has been such as to perfect his title under and by virtue of the statute of limitations. We think it has. As before stated, we are of the opinion that the defendant J. L. Blackwell is not bound by the decree rendered in the cause of Wilcox and complainants against W. P. Blackwell and others, which decree adjudged that Wilcox and complainants and W. P. Blackwell were owners of said lands as tenants in common. But if it be conceded that the effect of said decree was such as to make the defendant J. L. Blackwell a tenant in common with Wilcox and complainants, we think his possession of said lands, after the decree in the cause of Wilcox and complainants against W. P. Blackwell and others was rendered, was of such a nature and character as to give effect to the statute of limitations in his favor against his cotenants.

The final decree in the cause of Wilcox and complainants against W. P. Blackwell and others was rendered in the supreme court on September 18, 1897. The bill in the pending cause was filed December 18, 1908. The evidence shows that the defendant J. L. Blackwell was in possession of the lands at the time of the filing of the bill in the former litigation under color of title, and that he remained in possession of said lands continuously from that time until the filing of the bill in the pending cause. The complainants were never in possession of said land. The possession of the defendant J. L. Blackwell was open and notorious. There were about one hundred acres of said lands cleared and inclosed by fence. He cultivated the cleared lands each year by growing various crops thereon. He cut and removed

Taylor v. Blackwell.

practically all the merchantable timber from said lands. He sold some fifteen tracts off of said lands to various parties. The deeds executed to some of his vendees were recorded in the register's office of the county in which said lands were situated, and some of his vendees cleared a portion of their lands and erected inclosures and houses thereon. The defendant J. L. Blackwell never, at any time, accounted to the complainants for rents, or for the proceeds of any timber cut and removed from said lands, and was never asked to do so by them. He was in open, notorious, and active possession of said lands for more than eleven years between the date of the rendition of the decree in the cause of Wilcox and complainants against W. P. Blackwell and others and the date of the filing of the bill in the pending cause, and his possession during all that time was never questioned and interfered with by the complainants.

In *Hubbard v. Wood's Lessee*, 1 Sneed, 279, 280, it was held that to give effect to the statute of limitations in favor of one tenant in common against another, an actual ouster must be clearly established; that nothing but an actual ouster, or what is held to be equivalent, can give a tenant in common an exclusive possession, seizen and possession of one being the seizen and possession of the other. One can never be disseized by another without actual ouster. It was announced, however, in that case that an exclusive adverse possession of the whole tract of land, or the exclusive receipts of the rents and profits, no demand being made by the other tenants, or, if made, refused and his title denied—may

Taylor v. Blackwell.

be evidence of disseizen or actual ouster, and that the jury will be directed to presume an actual ouster, and the right of the cotenant would be held to be barred by the statute of limitations.

In *Saunders v. Hackney*, 10 Lea, 203, the rule announced in the case of *Hubbard v. Wood's Lessee*, supra, was quoted with approval by the court. The rule was also announced in *Morelock v. Bernard*, 15 Lea, 169, and in *Coal Creek Min., etc., Co. v. Ross*, 12 Lea, 1, 10, and in *King v. Rowan*, 10 Heisk., 675.

It results that the decree of the chancellor will be reversed, and the bill of complainants will be dismissed, with costs.

+

Southern Ry. Co. v. Pouder.

SOUTHERN Ry. Co. v. WILLIAM R. POUDER *et al.*

(Knoxville. September Term, 1918.)

1. EMINENT DOMAIN. Compensation. Improvements made by condemnor.

Where railway company constructed a freight depot on lot on assumption that it was entitled to possession, held, that defendant, who thereafter was adjudged the owner, would not, in condemnation proceedings by the railway, be entitled to recover for the improvements. (*Post*, pp. 200, 201.)

Cases cited and approved: Southern Ry. Co. v. Jennings, 130 Tenn., 450; St. Johnsville v. Smith, 184 N. Y., 341; United States v. A Certain Tract of Land, 47 Cal., 515; Justice v. Nesquehoning Valley R. Co., 87 Pa., 28; Jones v. N. O., etc., R. Co., 70 Ala., 227; Toledo, etc., R. Co. v. Dunlap, 47 Mich., 465; Newgass v. St. L., etc., R. Co., 54 Ark., 140; St. L., etc., R. Co. v. Nyce, 61 Kan., 394; Jacksonville, etc., R. Co. v. Adams, 28 Fla., 631.

2. EMINENT DOMAIN. Review. Scope.

It is unnecessary for court on appeal to decide whether defendants are entitled to value of lot without improvements at the time of the condemnation proceedings, as distinguished from the value of the lot at the time of plaintiff's entry, no distinction having been taken by defendants between the present value of the lot without the improvements and the present value of the lot with the improvements. (*Post*, pp. 201, 202.)

3. APPEAL AND ERROR. Review. Damages. Concurrence of the lower courts.

Where there is a concurrence of the two lower courts as to the amount of damages in a condemnation proceeding, the supreme court will not interfere except under very unusual circumstances. (*Post*, p. 202.)

Cases cited and approved: Grant v. Railroad, 129 Tenn., 398; Carolina, etc., R. Co. v. Shewalter, 128 Tenn., 363.

Southern Ry. Co. v. Pouder.

4. **EMINENT DOMAIN.** Review. Matters not presented on motion for new trial.

Assignment with reference to allowance of interest will be overruled, where the matter was not called to the attention of the trial court on motion for new trial. (*Post*, p. 202.)

FROM WASHINGTON.

Appeal from the Law Court of Washington County.
—HON. DANA HARMON, Judge.

HARR & BURROW, for appellant.

S. E. MILLER and G. T. LEE, for appellees.

MR. JUSTICE GREEN delivered the opinion of the Court.

This proceeding was instituted by the Southern Railway Company to condemn a lot in Johnson City for depot purposes. Both sides were dissatisfied with the result in the circuit court and appealed in error to the court of civil appeals. The judgment of the lower court was there affirmed, and the case has been brought here.

The suit was instituted December 26, 1916, and the property sought to be condemned had already been taken and was covered by the freight depot of the railway company.

Prior to the erection of the depot, the lot was a strip of land about thirty feet wide, was vacant, and had been used as an alleyway. The railway company, assuming that there had been a dedication, procured from the city an ordinance closing this alley, and, further-

Southern Ry. Co. v. Pouder.

more, procured a deed from persons claiming title to the lot.

It developed that the defendants herein also claimed title to this lot, and in litigation, formerly reaching this court, were given a decree for the land.

In the former suit, the railway company did not assert its right to hold the land as a condemnor, but resisted on the strength of its title merely as a defendant in ejectment.

Some other proceedings were had below after the other suit was decided in this court against the railway company, and it resulted that the railway company filed the petition herein to condemn. As stated above, the company had erected a large structure, used as a freight depot, covering this lot, several years ago, on the assumption that it was entitled to possession thereof.

The controversy is whether the railway company shall pay the value of the lot as it was when the company entered, or whether it shall be required to pay for the lot as it now is, with the improvements thereon. The trial judge held that defendants were only entitled to damages equivalent to the value of the lot as it was when the railway company entered.

Defendants assign this action of the trial judge as error and insist that they are entitled to recover the value of the lot as it now lies. They rely on *Southern Railway Co. v. Jennings*, 130 Tenn., 450, 171 S. W., 82. That was a case in which the railway company took a conveyance of land from the life tenant, ignoring the rights of the remainderman. When the life estate fell in

Southern Ry. Co. v. Pouder.

the remainderman sued, and it was held that he was entitled to recover the value of the land as of the time his right of action accrued. The facts in *Southern Railway Co. v. Jennings*, supra, were peculiar, and there was no question of the value of improvements placed on the land by the railway company, and the case is not in point here.

The efforts of defendants in this suit is to recover the value of the improvements placed on the land by the railway company, upon the theory that the latter was a trespasser.

There is some authority for the defendant's position, notably, *St. Johnsville v. Smith*, 184 N. Y., 341, 77 N. E., 617, 5 L. R. A. (N. S.), 922, 6 Ann. Cas., 379, and *United States v. A Certain Tract of Land*, 47 Cal., 515. When these cases are analyzed, however, it is doubtful if the harsh rule applicable to a trespasser would be applied to a public service corporation endowed with the right of eminent domain which enters under a color of title, even in these jurisdictions.

The great weight of authority both in England, and America is to the contrary, and it is generally held that the measure of damages to which the owner of land is entitled under such circumstances is the value thereof without the improvements. It is usually so ruled, although the condemnor enters without color of right.

It is said that the compensation to which the owner is entitled as against an enterer possessed of the forum of eminent domain is merely just compensation for the loss and injury he has sustained; that the improvements placed upon the land are dedicated to public

Southern Ry. Co. v. Pouder.

uses and not to the use and benefit of the freehold; that such improvements are never designed to be incorporated with the soil, except for a purpose attending the possession; and that in proceedings to obtain a legal right to occupy the land there would be no sense in compelling a condemnor to pay for his own property. In other words, such improvements are not built to improve the land, or to enhance its ordinary utility, but to be used as a part of an easement for public purposes, entirely independent of the ordinary uses of the ground. *Justice v. Nesquehoning Valley R. Co.*, 87 Pa., 28; *Jones v. N. O. etc., R. Co.*, 70 Ala., 227; *Toledo, etc., R. Co. v. Dunlap*, 47 Mich., 465, 11 N. W., 271; *Newgass v. St. L., etc., R. Co.*, 54 Ark., 140, 15 S. W., 188; and numerous other cases collected in notes, 6 Ann. Cas., 383, 13 Ann. Cas., 980.

Very elaborate discussions of this question are to be found in *St. L., etc., R. Co., v. Nyce*, 61 Kan., 394, 59 Pac., 1040, 48 L. R. A., 241, and *Jacksonville, etc., R. Co. v. Adams*, 28 Fla., 631, 10 South., 465, 14 L. R. A., 533; these cases being in harmony with the majority rule just announced.

So we are of opinion that defendants are not entitled to recover for the value of this property with the improvements thereon, and this was their sole contention below.

The trial judge limited damages to the value of the lots at the time of the entry by the railway company. No distinction was taken by defendants between the present value of the lot without the improvements, and the present value of the lot with the improvements. It

Southern Ry. Co. v. Pouder.

is not, therefore, necessary for us to decide whether defendants were entitled to the value of the lot without the improvements at the time of the condemnation proceedings as distinguished from the value of the lot without the improvements at the time of the entry. This question was not made. Defendants undertook to prove by their witnesses the value of the property as it stood at the time of the condemnation proceeding, and requested the trial judge to direct the jury to assess the value of the property as it then stood. As the property stood, the improvements, of course, were included.

It results that defendants' assignments of error are overruled.

The railway company assigns for error that the amount allowed as damages in the lower courts is excessive. This assignment must likewise be overruled. When there is a concurrence in the two lower courts on the amount of damages, this court will not interfere except under very unusual circumstances: *Grant v. Railroad*, 129 Tenn., 398, 165 S. W., 963; *Carolina, etc., R. Co. v. Shewalter*, 128 Tenn., 363, 161 S. W., 1136, L. R. A., 1916C, 964, Ann. Cas., 1915C, 605.

The railway company also makes an assignment of error with reference to the allowance of interest. This matter, however, was not called to the attention of the trial court on the motion for a new trial, and the assignment of error is therefore overruled.

Other points made by the railway company do not require discussion.

The judgment of the court of civil appeals is affirmed.

Stearns Coal & Lumber Co. v. Jamestown R. Co.

STEARNS COAL & LUMBER CO. v. JAMESTOWN R. CO. *et al.*

(Knoxville. September Term, 1918.)

1. ESTOPPEL. Inconsistency of conduct.

While the law of judicial estoppel is ordinarily applied to one who has made an oath to a state of facts in a former judicial proceeding which in a later proceeding he undertakes to contradict, yet it is frequently applied, where no oath is involved, to one who undertakes to maintain inconsistent positions in a judicial proceeding. (*Post*, p. 206.)

Cases cited and approved: *Stamper v. Venable*, 117 Tenn., 557; *Lillard v. Porter*, 39 Tenn., 177; *Bristol, etc., Trust Co. v. Jonesboro Trust Co.*, 101 Tenn., 545; *Norfolk, etc., R. R. Co. v. Consolidated Turnpike Co.*, 111 Va., 131; *Scanlon v. Walshe*, 81 Md., 118.

2. ESTOPPEL. Judicial estoppel.

Where defendant railway company's charter and amended charter were on record in the county, when complainant impleaded it as duly organized corporation, complainant in a subsequent suit is estopped, whether the suits be regarded as separate or as one proceeding, from setting up that railway is not a duly organized corporation. (*Post*, p. 207.)

Cases cited and approved: *McLemore v. Railroad* 111 Tenn., 639; *Harris v. Columbia Trust Co.*, 114 Tenn., 328.

3. ESTOPPEL. Reliance on former conduct.

Where in a former suit complainant recognized the right of defendant railway to take the right of way in question, and defendant, believing that it had the right of way, extended its lines in connection therewith, complainant will not be relieved of the position taken in the former suit in subsequent suit in ejectment. (*Post*, pp. 208-209.)

Stearns Coal & Lumber Co. v. Jamestown R. Co.

FROM SCOTT.

Appeal from the Chancery Court of Scott County.—
Hon. HUGH G. KYLE, Chancellor.

Wm. WADDLE and E. G. FOSTER, for appellants.

L. D. SMITH, J. H. ANDERSON and JOHN W. STAPLES,
for appellees.

MR. JUSTICE GREEN delivered the opinion of the Court.

This is an action in ejectment brought to recover a strip of land occupied as a right of way by the Oneida & Western Railroad Company. This strip runs about four miles through the lands of the complainant.

A demurrer was interposed by the defendants below, which was sustained by the chancellor, and the complainant has appealed.

The bill avers that the Jamestown Railway Company was duly incorporated in October, 1912; that on July 3, 1913, an amendment was attempted to be made to the charter of the Jamestown Railway Company, whereby its name was changed to the Oneida & Western Railroad Company, and whereby its termini were changed. It is charged that there is no authority under the statutes of Tennessee for such a radical amendment, that is, a change of the termini by way of amendment, and it is accordingly insisted that the amendment is void, and the Oneida & Western Railroad Company is not a legally organized corporation.

The bill further discloses that in May, 1916, the complainant brought a damage suit in the criminal and law

Stearns Coal & Lumber Co. v. Jamestown R. Co.

court of Scott county against the Oneida & Western Railroad Company for damages for going upon its lands, but it is said:

"At the time it brought said damage suit in the criminal and law court it had not investigated the attempted amendment of the Oneida & Western Railway Company, and was not advised as to the actual situation of the Oneida & Western Railway Company, and that the Oneida & Western Railway Company had no authority to do as it was attempting to do, by taking charge of complainant's land, committing trespass and waste thereon, as it was attempting to do."

And the bill insisted that: "Said suit in the criminal and law court should be enjoined in this proceeding, and all questions settled in this court and in this proceeding, where complainant can reach its equitable rights," etc.

It was prayed that the suit in the criminal and law court of Scott county be enjoined, and that "the attempted Oneida & Western Ry. Co. be decreed to be void and of no effect and inoperative," and that the complainant have a decree for the land, damages, and costs.

The demurrer interposed by the defendants raised several interesting questions, namely, the validity of the amendment of the charter of the Jamestown Railway Company, the power of a *de facto* corporation to exercise the right of eminent domain, and the question of election of remedies, and other questions.

We do not find it necessary to consider all of these things, inasmuch as the complainant is, in our opinion, judicially estopped to maintain its present bill.

Stearns Coal & Lumber Co. v. Jamestown R. Co.

While the law of judicial estoppel is ordinarily applied to one who has made oath to a state of facts in a former judicial proceeding which in a later proceeding he undertakes to contradict, yet it is frequently applied, where no oath is involved, to one who undertakes to maintain inconsistent positions in a judicial proceeding. *Stamper v. Venable*, 117 Tenn., 557, 97 S. W., 812.

It has twice been held by this court that one who sues a corporation as such thereby admits the legality of its incorporation, and is thereafter estopped from denying such legal organization in that suit. *Lillard v. Porter*, 2 Head (39 Tenn.), 177; *Bristol, etc., Trust Co. v. Jonesboro Trust Co.*, 101 Tenn., 545, 48 S. W., 228.

Another illustration of this rule is found in *Norfolk, etc., R. R. Co. v. Consolidated Turnpike Co.*, 111 Va., 131, 68 S. E., 346, Ann. Cas., 1912A, 239, where an assignee of a condemnor in the first suit relied on the validity of the condemnation, and in the latter suit undertook to challenge the condemnor's right of eminent domain.

So, in *Scanlon v. Walshe*, 81 Md., 118, 31 Atl., 498, 48 Am. St. Rep., 488, a wife averred in divorce proceedings brought against her husband that she had been continent. Later she undertook to establish that certain children born in wedlock were children of another man, so as to permit them to share in the estate of her paramour, which they were entitled to do under a Maryland statute. It was held that she was estopped by her averment of fidelity in the divorce proceedings to later set up that she had been unfaithful to her husband.

Stearns Coal & Lumber Co. v. Jamestown R. Co.

Applying these authorities to the case in hand, inasmuch as this complainant brought its damage suit in the criminal and law court of Scott county to recover from the Oneida & Western Railroad Company, suing the latter as a corporation entitled to the right of eminent domain, we think complainant is now estoppel to take a different position.

This is certainly true if the damage suit and the present suit be regarded as constituting one proceeding, and we think another view cannot fairly be taken. The bill in this case asks for an injunction of the damage suit and that all matters raised therein be terminated and settled herein. The complainant itself thus undertakes to unify the two suits.

On the other hand, if the two proceedings be treated as separate, nevertheless we think the complainant is estopped from making averments in this bill antagonistic to the position assumed by it in the damage suit. It is true that parties will be relieved of statements made by them in former proceedings, when such statements were inconsiderate, and when other sufficient matters of excuse appear. *McLemore v. Railroad*, 111 Tenn., 639, 69 S. W., 338; *Harris v. Columbia Trust Co.*, 114 Tenn., 328, 85 S. W., 897.

The complainant, however, offers no excuse for the position taken by it in the damage suit, when it impleaded the Oneida & Western Railroad Company as a duly organized corporation which had taken complainant's land in the exercise of the right of eminent domain. Complainant merely says "it had not investigated" these matters when it brought its damage suit.

Stearns Coal & Lumber Co. v. Jamestown R. Co.

"The rule that a party will not be allowed to maintain inconsistent positions in judicial proceedings is not strictly one of estoppel, partaking rather of positive rules of procedure based on manifest justice, and to a greater or less degree on the orderliness, regularity, and expedition of litigation." 10 R. C. L., 698.

If this rule be indeed based on orderliness, regularity, and expedition of litigation, the courts cannot except from its operation those who precipitate litigation without investigation. Haphazard procedure may not be thus condoned.

This is not a case like *McLemore v. Railroad*, supra, where the statements of which the complainant was relieved were made respecting a complicated title, nor is it a case like the *Columbia Trust Co. v. Harris*, supra, where the allegation was with respect to the *status* of a foreign corporation.

In the case before us, the charter and the amended charter were matters of record in the county where this suit was brought, and we can see no reason why the complainant should be excused for not investigating when an investigation was so easy to make.

Moreover, a complainant will not be relieved of a position taken in a former litigation in a subsequent litigation between the same parties, where the adverse party has acted to his prejudice by reason of the complainant's former attitude. This rule is recognized in our cases just referred to, and is said to be a rule of universal application in 10 R. C. L., p. 702.

It was stated at the bar, and we may judicially note, that the Oneida & Western Railroad was in course of

Stearns Coal & Lumber Co. v. Jamestown R. Co.

construction at the time the damage suit was brought in Scott county. During the period that elapsed between the bringing of the damage suit and the filing of the bill herein, work was done on this line of railroad. By the damage suit the complainant recognized the right of the railroad company to enter and take this right of way; and, believing that it had these four miles, the railroad company extended its lines in connection therewith. To deprive the company of this four miles of its route would destroy the value of the extensions made on the faith of complainant's position.

The court sees little of equity in the complainant's bill. It is the owner of a large tract of timber land, the value of which will necessarily be much enhanced by this line of railroad. It is entitled to recover in its damage suit full reparation for any injury it has sustained.

The ends of justice will not be reached by permitting complainant to depart from the route through the law court it has chosen. On the contrary, such a departure might destroy this new railroad, or make it necessary for the promoters of the railroad to preserve their property at the complainant's price. As a beneficiary of this public improvement, the complainant has small justification for the obstruction of such improvement, and the court will not aid such a course by making any exception to well-settled rules of practice in complainant's favor.

Without further comment, for the reasons stated, the decree of the chancellor will be affirmed, and complainant's bill dismissed.

Portland Cement Co. v. Lumber & Box Co.

CAROLINA PORTLAND CEMENT Co. v. HITT LUMBER & Box
Co. *et al.*

(Knoxville. September Term, 1918.)

MECHANICS' LIENS. Right to lien. Materials furnished to materialman. "Mechanic, founder, or machinist."

Where owner ordered material from materialman, who in turn turned ordered it from another materialman, the latter materialman has no lien for the material so furnished and used in the construction of the building, having had not special contract with owner or his agent, under Shannon's Code, section 3531, in view of art of 1860, and being no "mechanic, founder, or machinist," within section 3540.

Acts cited and construed: Acts 1846, ch. 118; Acts 1860, sec. 2739.

Cases cited and approved: Greenwood et al. v. Tennessee Mfg. Co., 32 Tenn., 130; Greenwood & Bynum, 35 Tenn., 267; Stevens v. Wells, 36 Tenn., 387.

Cases cited and distinguished: Greenwood v. Tennessee Mfg. Co., 32 Tenn., 130; Stevens v. Wells, 36 Tenn., 387; Stone Co. v. Board of Publication, 91 Tenn., 200; Thompson v. Baxter, 92 Tenn., 307.

Codes cited and construed: Secs. 3531, 3540(S.); Secs. 1981, 1986 (1858).

FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County.—Hon. W. B. GARVIN, Chancellor.

SIZER, CHAMBLISS & CHAMBLISS, for appellant.

BROWN, SPURLOCK & BROWN, for appellee.

Portland Cement Co. v. Lumber & Box Co.

MR. JUSTICE HALL delivered the opinion of the Court.

In March, 1917, the defendant Chattanooga Manufacturing Company, a corporation doing business in the city of Chattanooga, Tenn., contracted with one A. F. Hahn to construct for it a factory building on a lot owned by it situated in said city, and which is fully described in the bill filed in this cause, in accordance with plans and specifications which had been prepared by an architect. Under the contract Hahn was to furnish all of the materials for said building, except the lumber and millwork. These materials the defendant itself agreed to furnish, and pursuant to said agreement it contracted with the Hitt Lumber & Box Company, also a corporation doing business in the city of Chattanooga, and a dealer in and a planer of lumber, for the lumber and millwork for said building. The Hitt Lumber & Box Company, not having in stock the flooring and certain heavy framing timbers required for said building, contracted with the complainant, who is a corporation chartered and organized under the laws of the State of South Carolina, and has an office and place of business at Birmingham, Ala., and was engaged in the manufacture and sale of lumber, to furnish the flooring and timbers required for said building, amounting to 128,340 feet, at the prices of \$26.50 and \$18.95 per 1,000 feet, less freight to Chattanooga.

Complainant had furnished under its contract with the Hitt Lumber & Box Company, materials to the amount of \$4,202.61, when said company was placed in the

Portland Cement Co. v. Lumber & Box Co.

hands of a receiver and was later adjudged a bankrupt. Thereafter, the remainder of said materials, to be furnished by complainant under its contract with the Hitt Lumber & Box Company, were furnished direct to the defendant Chattanooga Manufacturing Company, under a contract entered into with it by the complainant. The materials furnished to the Manufacturing Company, under its contract with the complainant, have been paid for, but none of the materials furnished under its contract with the Hitt Lumber & Box Company were paid for.

The bill in this cause was filed by the complainant against both the Chattanooga Manufacturing Company and the Hitt Lumber & Box Company (the latter company being sued upon authority given by the bankrupt court) to recover of said defendants for the materials furnished by complainant to the Hitt Lumber & Box Company, and to have a furnisher's lien declared upon the property of the defendant Chattanooga Manufacturing Company for its satisfaction.

The theory of the bill was that the Chattanooga Manufacturing Company and the Hitt Lumber & Box Company entered into a contract by which the latter company, either as the agent of, or as the original contractor of, the former company, undertook and agreed to manufacture or procure for the said Manufacturing Company certain timbers and flooring, which the bill alleges were to be cut and shaped to sizes and dimensions required for the complainant's building. The bill alleged that notice was given the Chattanooga Manufacturing Company that a lien was claimed upon

Portland Cement Co. v. Lumber & Box Co.

the property upon which said improvement had been made, in accordance with the statute.

The Chattanooga Manufacturing Company in its answer, specifically denied that complainant was contracted with by the Hitt Lumber & Box Company, either as its agent or as its original contractor, as alleged in the bill. It also denied that complainant had given the notice required by statute within the time required, which was necessary to perfect a lien upon its property for the materials furnished.

Upon the hearing the chancellor decreed that the complaint was a furnisher of materials to one with whom the owner had contracted for the furnishing of materials; that the Hitt Lumber & Box Company was not the agent of the owner of the property in making the contract with the complainant, but in making said contract acted in its own behalf and for his own benefit; that therefore complainant was not entitled to a lien under section 1981 of the Code (Shannon's, section 3531), nor was the Hitt Lumber & Box Company a "mechanic, founder, or machinist," within the meaning of section 1986 of the Code (Shannon's, section 3540); and that therefore complainant was not entitled to a lien on the property of the defendant Manufacturing Company, or to a personal judgment against that company, and the bill was dismissed in so far as it sought such relief; but a decree was rendered in favor of the complainant against the Hitt Lumber & Box Company for the amount sued for, with interest from the date of the filing of the bill.

Portland Cement Co. v. Lumber & Box Co.

From so much of said decree as denied complainant relief against the Chattanooga Manufacturing Company the complainant has appealed, and has assigned errors.

The question presented by the assignments of error is: Do the facts bring the complainant within the provisions of the mechanic's lien law of this State, and is it entitled to have its claim declared a lien upon the property of the Chattanooga Manufacturing Company, with whom it occupied no contractual relation?

Section 1981 of the Code (Shannon's Section 3531), gives a lien: "upon any lot of ground or tract of land upon which a house has been constructed, built, or repaired, or fixtures or machinery furnished or erected, or improvements made, by special contract with the owner or his agent, in favor of the mechanic or undertaker, founder or machinist, who does the work or any part of the work, or furnishes the materials or any part of the materials," etc.

This section is, in substance, the first section of Acts 1846, chapter 118. By section 1986 of the Code (Shannon's, Section 3540) this lien is extended to "every journeyman or other person employed by such mechanic, founder, or machinist, to work on the buildings, fixtures, machinery, or improvements, or to furnish material for the same."

This section is, in substance, the second section of the act of 1846.

In *Greenwood v. Tennessee Mfg. Co.*, 2 Swan, 130, it was held that the merchant who furnished the machinery by contract with the owner to be used in erecting

Portland Cement Co. v. Lumber & Box Co.

a factory was not entitled to the lien provided by this act. The reason assigned by the court was that the lien was only given in favor of such "mechanic or undertaker." The court said:

"Mr. Greenwood's contract was with the owner, and had no connection with the undertaker."

In *Stevens v. Wells*, 4 Sneed, 387, the complainants, who were lumber dealers, sold to the owner lumber to build a house on his land. The same not having been paid for, suit was brought to have a lien declared on the land upon which the improvement had been erected under the act of 1846 for the satisfaction of the debt growing out of the sale of the lumber. The court, in construing both sections of the act, said:

"Complainants are within neither of these provisions. They are neither mechanics who have worked upon the house, nor are they undertakers for its construction, nor have they furnished materials to the mechanic or undertaker and given the owner notice, as required by the statute. They have simply sold the owner a bill of lumber, for which the statute gives them no lien, and they stand as other creditors of the owner. See *Greenwood et al. v. Tennessee Mfg. Co.*, 2 Swan, 130."

In *State Co. v. Board of Publication*, 91 Tenn., 200, 18 S. W., 406, the cases above cited were reviewed by the court, as well as the amendment of said act made at the time it was brought into the Code of 1858, and by a later act passed by the General Assembly of 1860, which extended the benefits conferred by said act to all persons doing any portion of the work, or furnish-

Portland Cement Co. v. Lumber & Box Co.

ing any portion of the material, for the building contemplated in said section. In construing said amendments the court said:

"The act was widened, as carried into the Code of 1858, so as to add to the 'mechanic or undertaker' the 'founder or machinist.' This amendment met the difficulty pointed out by the Cases of *Greenwood and Bynum* [3 Sneed, 267], but did not cover the trouble pointed out by *Stevens v. Wells*, 4 Sneed, 387, where it was held that one who furnished materials to the owner of the house, and upon contract with him, had no lien, because, said Judge HARRIS, such persons 'are neither mechanics who have worked on the house, nor are they undertakers for its construction, nor have they furnished materials to the mechanic or undertaker.'

"The act of 1860 amends section 2739 (section 1981 of the Code of 1858) in such manner as to meet the last . . . series of decisions mentioned. But this amendment in no way affects section 2746 (section 1986 of the Code of 1858). The amended section relates alone to a limited class of persons who have special contracts with the owner. Section 2746 (section 1986 of the Code of 1858) relates to a class of persons who, without any contract with the owner, may acquire a lien. The section amended gave the lien only where the materials were furnished by a mechanic or undertaker or founder or machinist having a special contract with the owner. By the amendment the lien is extended to 'all persons' who have a special contract with the owner, who do any part of the work or furnish

Portland Cement Co. v. Lumber & Box Co.

any part of the materials. The thing essential to the lien given by the amendment is that the person claiming it shall have a special contract with the owner for the work or material."

We think it is clear that, under the rule announced in that case, a dealer in lumber who sells to the owner is neither a "mechanic or undertaker or founder or machinist." His lien is given by the act of 1860, and is dependent upon his special contract with the owner. In other words, it must accrue to him under section 1981 of the Code (Shannon's, Section 3531). Section 1986 (Shannon's, Section 3540) gives a lien to the person employed by such "mechanic, founder, or machinist, to work on the buildings, fixtures, machinery, or improvements, or to furnish material for the same." It does not give a lien to lumber dealers who have sold lumber to another dealer with whom the owner has contracted to furnish lumber for the construction of his house. Nor does the act of 1860 give to the persons thereby protected the status of "mechanics, founders, or machinists," as these terms are employed in section 1981 of the Code (Shannon's Section 3531).

In *Thompson v. Baxter*, 92 Tenn., 307, 21 S. W., 669, 36 Am. St. Rep., 85, this court said:

"This lien is purely statutory, and unknown to the common law. Only those enumerated and embraced in the statute are entitled to the lien. A liberal construction of the mechanic's lien law does not mean that they shall be liberally construed in embracing or including others than those enumerated in the statutes. It must clearly appear that the claimant has a lien. No

Portland Cement Co. v. Lumber & Box Co.

one is entitled to the lien unless the statute includes him or them. They are not to be included by strained construction. Unless the statute gives the lien, the party has none."

The complainant was neither a "mechanic or undertaker, founder, or machinist," who had furnished the lumber, for which it seeks a recovery and lien, by special contract with the owner of the property upon which the improvement was made. Nor was it employed by Hahn, with whom the owner of the property had contracted to furnish said lumber. It therefore is not entitled to a lien under the act of 1846. It cannot have the lien under the act of 1860, because it had no special contract with the owner to furnish the lumber. The proof fails to sustain the allegation of the bill that the Hitt Lumber & Box Company, in contracting with complainant for said lumber, was acting as the agent of the Chattanooga Manufacturing Company. Complainant simply stands in the attitude of a dealer who has furnished lumber to another dealer, who had contracted with the owner to furnish such lumber, and is therefore not protected by the statute.

The decree is affirmed, with costs.

Heggie v. Hayes.

GEORGE HEGGIE v. ELIZABETH HAYES.

(*Knoxville*. September Term, 1918.)

1. BREACH OF MARRIAGE PROMISE. Pleading. Variance.

In breach of promise suit, that declaration alleged a contract of marriage entered into October 1, 1915, and the proof showed a contract entered into in September, 1912, did not create a fatal variance; there being only one contract of marriage. (*Post*, pp. 221-223.)

Case cited and approved: *May v. Railroad*, 129 Tenn., 521.

Case cited and distinguished: *Lady Shandois v. Simpson*, Cro. Eliz., 880.

2. PLEADING. Cure by verdict.

A misstatement of time in a declaration is cured by the verdict. (*Post*, pp. 223, 224.)

Case cited and approved: *Nashville Life Ins. Co. v. Mathews*, 76 Tenn., 499.

3. SEDUCTION. Pleading. Variance.

In suit for seduction, that seduction was alleged to have occurred on October 1, 1915, whereas the proof tended to show that it occurred in September, 1912, will not support contention that there is no evidence to prove case laid in the declaration. (*Post*, p. 224.)

4. LIMITATION OF ACTIONS. Seduction. Breach of marriage promise. Accrual of right.

Where all of the time the unlawful relation continued the parties were under a contract of marriage, the Statute of Limitations would not begin to run until the last act of seduction was had under the promise of marriage. (*Post*, pp. 224, 225.)

Case cited and approved: *Davis v. Young*, 90 Tenn., 303.

Heggie v. Hayes.

5. LIMITATION OF ACTIONS. Seduction. Breach of marriage promise. Accrual of right.

Although contract of marriage was not entered into prior to the first unlawful act, if the contract existed thereafter concurrently with the illicit intercourse, such contract of marriage was sufficient to prevent the defendant from referring the Statute of Limitations to the first unlawful act. (*Post*, pp. 225, 226.)

Case cited and approved: *Ferguson v. Moore*, 98 Tenn., 342.

6. ESTOPPEL. Admissions by counsel. Judicial estoppel.

In suit for breach of promise and seduction, where defendant's counsel conceded to jury that plaintiff had a good reputation, and the case was tried on that theory, it was not reversible error for the court, on motion for new trial, to disregard testimony to the effect that others had enjoyed sexual favors from plaintiff prior to time of charge of seduction. (*Post*, pp. 226-228.)

Case cited and distinguished: *Stearns Coal & Lumber Co. v. Jamestown Ry.*, 141 Tenn., —.

7. APPEAL AND ERROR. Review. Intermediate courts. Extent. It is the duty of the supreme court to ascertain if there are any errors in action of court of civil appeals and to correct such errors, but not to go over the entire record and decide the case as a new controversy. (*Post*, p. 228.)

FROM HAMILTON.

Appeal from the Circuit Court of Hamilton County to the Court of Civil Appeals, and from the Court of Civil Appeals to the Supreme Court.—HON. NATHAN L. BACHMAN, Judge.

W. B. MILLER and GEORGE H. WEST, for appellant.

THOMPSON, WILLIAMS & THOMPSON and J. H. DALY, for appellee.

Heggie v. Hayes.

MR. JUSTICE GREEN delivered the opinion of the Court.

This suit was brought for breach of promise and seduction. There was a judgment below in favor of plaintiff for \$5,000 for the breach of promise of marriage, and \$11,000 for seduction. The court of civil appeals affirmed so much of the judgment as related to the breach of promise, but directed a remittitur of \$8,000 on that portion of the judgment relating to seduction, and entered a total judgment of \$8,000.

Both sides have filed petitions for *certiorari*, the plaintiff in error insisting that there should have been no recovery against him at all, and the defendant in error complaining of the remittitur suggested by the court of civil appeals, which she accepted under protest. The case has been argued in this court.

We have discussed the facts of this case orally, and do not find it necessary to embody them in this opinion, and shall only consider herein the questions of law raised by the parties.

It is conceded by the plaintiff in error that there was some evidence below of a marriage contract between the parties, and of a breach of that contract, and that there was some evidence below of seduction, but it is maintained that these matters were not proved as alleged in the declaration, or, in other words, that there was no evidence to sustain the verdict of the jury as the case was laid.

The first count of the declaration alleges a contract entered into between the parties whereby they mutually agreed to marry each other, and that this contract was entered into October 1, 1915. The plaintiff below

Heggie v. Hayes.

averred that she had continued unmarried and ready and willing to marry the defendant below, and on divers days had requested that the compact be fulfilled, but that the defendant below refused, and still refuses, to carry out said contract.

Proof introduced tended to show that the contract of marriage was entered into between the parties in September, 1912, instead of in October, 1915, as averred in the declaration, and it is urged that there is a fatal variance between the pleading and the proof.

This argument is not well taken. The alleged variance relates only to the matter of time.

While it is true that in personal actions, the rule of the common law is that the time must be stated, nevertheless, as said by Mr. Stephens:

"The time is considered in general as forming no material part of the issue, so that one time may be alleged and another proved. The pleader therefore assigns any time he pleases to a given fact." Stephens on Pleadings, star p. 292.

Mr. Stephens goes on to say that the time should be alleged under a *videlicet* unless the pleader wishes to be held to prove such time strictly. We suppose, however, that in modern pleading a *videlicet* is not strictly required. This is only a matter of form.

The modern rule is thus stated by Mr. Shipman:

"In all matters generally speaking, save those previously mentioned, time is considered as forming no material part of the issue, so that the pleader, when required to allege a time for any traversable fact, is not compelled to allege it truly, and may state a fact as occurring at one time and prove it as happening at

Heggie v. Hayes.

a different time. The reason of the rule is that as a day is not an independent fact or substantive matter, but a mere circumstance or accompaniment of such matter, it obviously cannot in its own nature be material, and can only be made so, if at all, by the nature of the fact or matter in connection with which it is pleaded. Therefore, if a tort is stated to have been committed, or a parol contract made on a particular day, the plaintiff is in neither case confined in his proof to the day as laid, but may support the allegation by proof of a different day, except that the day as laid in the declaration and as proved must both be prior to the commencement of the suit." Shipman's Common-law Pleading, p. 391.

That a parol contract may be laid as of one day and proven as of another has been the rule since the *Lady Shandois v. Simpson*, Cro. Eliz., 880.

"Time is usually immaterial and need not be proved as laid, but when material as a matter of description, strict proof is necessary." 31 Cyc., 706.

It is not suggested that there was more than one contract of marriage between the parties to this case, so that the time or date of this contract is not material as a matter of description nor for any other reason. So, under the authorities above cited, we must hold that the variance between the time averred and the time proven is immaterial.

To the same effect is *May v. Railroad*, 129 Tenn., 521, 167 S. W., 477, L. R. A., 1915A, 78, Ann. Cas., 1916A, 213.

In addition, this court has held that an omission to lay any time in a declaration is cured by the verdict

Heggie v. Hayes.

(*Nashville Life Ins. Co. v. Mathews*, 8 Lea [76 Tenn.], 499); and the general rule also is that a misstatement of time in a declaration is cured by the verdict. 31 Cyc., 776.

The quotation made by plaintiff in error from 3 Enc. Pl. & Pr., 186, to the effect that the time and place of the promised marriage need not necessarily be averred, but, when pleaded, the proof must conform to the time and place alleged, relates to the time and place of the execution of the contract, and not to the time and place when the contract of marriage was entered into. Other authorities cited in the brief of plaintiff in error do not require comment. Most of them are not in point, and, if any do conflict with the above views, we are not willing to follow them.

The next proposition advanced in behalf of plaintiff in error is quite similar. Seduction was alleged to have occurred on October 1, 1915, whereas the proof tended to show that it occurred in September, 1912, and it is urged that there is no evidence to prove the case laid in the declaration. We think the authorities just cited are conclusive of this contention.

The plaintiff in error then relies on the Statute of Limitations, which was pleaded by him. The proof shows that the seduction occurred in September, 1912, and this suit was not brought until September 21, 1916, and it is insisted that the suit is accordingly barred by the twelve-month Statute of Limitations.

As heretofore stated, the first count of the declaration alleges a contract of marriage entered into October 1, 1915, and continuing up until January 1, 1916. The second count of the declaration alleges a seduction on

Heggie v. Hayes.

the date mentioned, and that on divers other days and times between that date and the commencement of this suit the improper relation was renewed.

The proof of the plaintiff below tended to show a contract of marriage entered into the day after the first illicit act, and improper relations existing between her and the defendant below from this time up until within twelve months of suit. During all the time this unlawful relation continued the parties were under a contract of marriage.

Such being the case, under the rule laid down in *Davis v. Young*, 90 Tenn., 303, 16 S. W., 473, the Statute of Limitations would not begin to run against such a plaintiff until the last illegal act had under the promise of marriage.

The declaration in this case is inartificial, but it was not challenged and, considered as a whole, it does aver a seduction and a continuous unlawful relation under a contemporaneous contract of marriage. It does not make any difference that the contract of marriage was not entered into prior to the first unlawful act. If it existed thereafter concurrently with the illicit intercourse, such contract of marriage was sufficient to prevent the defendant below from referring the statute of limitations to his first unlawful act.

Davis v. Young, supra, has been expressly approved in *Ferguson v. Moore*, 98 Tenn., 342, 39 S. W., 341, where the trial judge charged that "seduction was a continuous act, and, if by several and continuous acts, promises, and artifices the defendant kept up his illicit intercourse" until within the statutory limit of suit,

Heggie v. Hayes.

the action would not be barred. This was commended as in accord with *Davis v. Young*, supra, and that authority extended to suits brought by the female as well as by her father.

It is furthermore insisted that the plaintiff's testimony shows a case of rape, and not a case of seduction. It is true that some of her language may bear this construction, but when her entire testimony is considered, together with the circumstances she details, it refutes any idea of rape.

It is finally urged that it was reversible error for the trial judge to disregard the testimony offered in behalf of the defendant below on a motion for a new trial, and to refuse a new trial in view of the evidence offered on this hearing.

The principal affidavits were from two men, who made oath that they themselves had enjoyed the sexual favor of plaintiff below prior to the time of her charge of seduction against the defendant below. Some other affidavits were offered tending to reflect on the woman.

The learned trial judge ruled that such statements of men voluntarily made with reference to a woman's character were not entitled to credit, and such men were not entitled to be believed.

However this may be, there was evidence offered on the motion for a new trial tending to contradict many of the statements contained in the aforesaid affidavits, and the finding of the trial judge on these controverted facts is, of course, binding upon us.

Beyond all this, however, and as a conclusive answer to the contention of plaintiff in error in this respect, it appears that upon the trial of this cause his attorney

Heggie v. Hayes.

conceded and stated to the jury that defendant in error was a woman of good reputation up to the time of the institution of this suit. The case was tried on that theory, and no proof was offered on the trial tending to besmirch her character.

Such being the state of the case, it was not permissible for the defendant below to undertake to shift his ground, attack the character of the woman, and assume a position entirely inconsistent with that taken upon the trial of the case, and in this way obtain a new trial.

The defendant below was free to rely on the bad character, if any he could show, of plaintiff below, and to prove that on the trial in bar of this suit. He was not willing, however, to take the chance of damages being aggravated by his failure to establish such contention, and he will not be allowed to experiment with the court and obtain a new trial and all the benefit of such matter without assuming the risk incident to its introduction at the hearing.

This is a proper case for the application of the doctrine of judicial estoppel which we have just discussed in *Stearns Coal & Lumber Co. v. Jamestown, Ry.*, 141 Tenn., 203, 208 S. W., 334:

“A new trial will not be granted . . . to enable a defendant to avail himself of a defense which was within the issues but not presented at the trial; or to make a defense inconsistent with the one presented, or contradictory to admissions made, or points tacitly conceded.” 29 Cyc., 852.

This disposes of all the assignments of the plaintiff in error.

Heggie v. Hayes.

Referring to the petition of the defendant in error with reference to the action of the court of civil appeals in suggesting a remittitur, we do not find it necessary to go into any elaborate consideration thereof.

Our revisory jurisdiction of the judgments of the court of civil appeals does not permit that we should try a case anew. We are not to go over the entire record and decide it as a new controversy. It is our duty to ascertain if there are any errors in the action of the court of civil appeals and to correct such errors.

Upon consideration of all the circumstances of this case, we are not prepared to say that the court of civil appeals erred in suggesting a remittitur of part of this verdict.

We are inclined to the opinion that the result reached by the court of civil appeals is substantially just, and are not disposed to interfere therewith.

The judgment of the court of civil appeals is accordingly affirmed.

State ex rel. v. Bush.

STATE EX REL. WILSON ET AL. *v.* NICK P. BUSH, SHERIFF.

(Knoxville, September Term, 1918.)

1. APPEAL AND ERROR. Moot question. Bill to remove sheriff. Expiration of term. Costs. Statutes.

Under the Ouster Act, appeal from decree dismissing bill to remove sheriff will be dismissed, where sheriff's term expires pending appeal, particularly in view of Acts 1917, ch. 107, giving presiding judge discretion over costs. (*Post*, pp. 231-236.)

Acts cited and construed: Acts 1915, ch. 11; Acts 1917, ch. 107.

Cases cited and approved: State ex rel. Howse, 132 Tenn., 452; State ex rel. Crump, 134 Tenn., 121; State and County of Tenn. v. Lewis, 78 Tenn., 168; Daugherty v. Nagel, 27 Idaho, 511; Albright v. Territory, 13 N. M., 64; People ex rel. Swann v. Loomis, 8 Wend. (N. Y.), 396; Hammer v. State ex rel. Richards, 44 N. J. Law, 667; Hunter v. Chandler, 45 Mo., 452; Commonwealth ex rel. v. Smith, 45 Pa., 59; People v. Hartwell, 12 Mich., 508.

Cases cited and distinguished: Tennessee ex rel. Maloney v. Condon, 108 Tenn., 82; Richardson v. McChesney, 218 U. S., 487; Croker v. Sturgis, 175 N. Y., 158.

Code cited and construed: Sec. 5175 (T.-S.).

2. OFFICERS. Resignation. Acceptance.

An officer's resignation is not complete until accepted by competent authority. (*Post*, p. 236.)

3. OFFICERS. Resignation. Denial of right.

Right of officer to resign will be denied, especially where resignation is hastily made to thwart litigation. (*Post*, p. 236.)

Cases cited and approved: Badger v. United States, 93 U. S., 559; State v. Rose, 74 Kan., 262; State v. McDaniel, 22 Ohio St., 354.

4. OFFICERS. Removal. Ouster Act.

Proceedings against officer under the Ouster Act should never be brought unless there is a clear case of official dereliction, as such

State ex rel. v. Bush.

a drastic statute should be invoked only in plain cases, not for purposes of inquisition. (*Post, pp. 236, 237.*)

Cases cited and approved: State ex rel. v. Howard, 139 Tenn., 73; Tabor v. Hipp et al., 136 Ga., 123; Norwood v. Clem, 143 Ala., 556.

Code cited and construed: Sec. 5175 (T.S.).

FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County
—HON. W. B. GARVIN, Chancellor.

W. B. MILLER, W. G. M. THOMAS and F. M. THOMPSON,
for appellants.

G. W. CHAMLEE, MURRAY & CHAMLEE and T. P.
SHEPHERD, for appellee.

MR. JUSTICE GREEN delivered the opinion of the
Court.

The bill in this case was filed on the relation of certain citizens of Chattanooga under chapter 11 of the Acts of 1915, known as the "Ouster Act," to remove defendant Bush from the office of sheriff of Hamilton county. He was charged with collecting illegal fees, and other misconduct. Much proof was heard, and the Chancellor dismissed the bill. The relators have appealed to this court.

The bill herein was filed March 6, 1918. Final decree was rendered by the Chancellor July 13, 1918. The record was filed in this court August 22, 1918. On September 1st, the term of Bush expired. The cause

State ex rel. v. Bush.

was set for hearing at the September term of this court, and has been recently argued.

A preliminary motion is made to dismiss this appeal on the ground that, since defendant's term of office has expired, there is no real controversy before the court—only a moot case. It is insisted on behalf of relators that the matter of costs is to be disposed of, and that for this reason the court should pass on the merits of the case.

We think the motion to dismiss the appeal is well taken and should be granted, and that the court cannot retain jurisdiction of an ouster suit where the defendant's term of office has expired, where nothing can be done upon decree here except to tax costs.

Chapter 11 of the Acts of 1915 provides a civil remedy for the removal of unworthy officials. That is its sole purpose. A judgment against a defendant in such proceeding carries no fine or penalty and imposes no disqualification to hold office, nor does it otherwise burden the removed official. *State ex rel. Howse*, 132 Tenn., 452, 178 S. W., 1110; *State ex rel. Crump*, 134 Tenn., 121, 183 S. W., 505, L. R. A., 1916D. 951.

So, when a defendant's term of office has expired pending appeal to this court, and no salary is involved, any decree that we could make would be altogether useless and ineffectual except to adjudge costs.

Under such circumstances, courts of last resort ordinarily decline to proceed, and appeals in such plight are usually dismissed.

This seems to be the invariable rule of the Supreme Court of the United States.

State ex rel. v. Bush.

In *Tennessee ex rel. Maloney v. Condon*, going up from this court (108 Tenn., 82, 65 S. W., 871), there was a contest over the offices of road commissioners of Knox county, under Thompson's Shannon's Code, section 5175 et seq. The terms of all the officers expired pending the writ of error, and that writ was dismissed. The supreme court said:

"There are cases in *quo warranto* in which judgment of ouster has been entered, although the term of the person lawfully entitled had expired, and also where informations have been retained when the statute provided for fine or damages; but here the proceeding cannot now be maintained as on behalf of the public; and considered, as counsel insists it should be, as merely a contest between two sets of officials and not between the state and its officials, the State courts would be at liberty to treat it as abated, and the mere matter of costs cannot be availed of to sustain jurisdiction."

Tennessee ex rel. Maloney v. Condon, 189 U. S., 64, 23, Sup. Ct., 579, 47 L. Ed., 709.

In *Richardson v. McChesney*, the same court held that the expiration of the term of office of a State official abated a suit to require certain personal acts on his part. The court said of defendant:

"He can only be rightly made to bear the costs of this proceeding if the complainant should succeed, and he only could be compelled to obey the decree of the court. As his official authority has terminated, the case, so far as it seeks to accomplish the object of the bill, is at an end; there being no statute providing for the substitution of McChesney's successor in a suit of

State ex rel. v. Bush.

this character." *Richardson v. McChesney*, 218 U. S., 487, 31 Sup. Ct., 43, 54 L. Ed., 1121.

The court in *Richardson v. McChesney*, supra, refers to many of its other decisions to the same effect.

In *Croker v. Sturgis*, the chief of the New York fire department had been illegally removed from duty by an order amounting to an indefinite suspension. This order was resisted, and the matter taken into the courts. When the case reached the court of appeals, the chief had been removed upon charges regularly preferred under the charter of the city, and his salary paid up until the time of his removal. The court said:

"Hence there is no right . . . capable of enforcement (here), except the costs heretofore awarded, and we have uniformly held that relief from a judgment for costs merely is not adequate ground upon which to reverse a judgment, if the questions arising upon the merits have become obsolete by lapse of time." *Croker v. Sturgis*, 175 N. Y., 158, 67 N. E., 307.

Ruling Case Law lays down the rule as follows:

"While pending the appeal the circumstances are changed to such an extent that the appeal involves merely a moot question, it will as a general rule be dismissed." 2 R. C. L., 169.

In Corpus Juris, we find the following: "On the same principle, the general rule is well settled that, if pending an appeal an event occurs which renders it impossible for an appellate court to grant any relief or renders a decision unnecessary, the appeal will be dismissed." 3 C. J., 360.

"So, mere lapse of time may create this condition, as where, pending an appeal from a judgment, order, or de-

State ex rel. v. Bush.

cree of the court in a case involving the infringement of a patent, the acts or tenure of a public or election officer, or other matter, the patent expires, the official term comes to an end, the election is held or the time for holding the same has passed, or the judgment, order, or decree of court is executed, and in other like cases." 3 C. J., 364.

Many authorities are collected in the notes under the sections of Corpus Juris above quoted, which abundantly sustain the text.

It will be seen from these authorities that an appeal will not be entertained merely to dispose of a matter of costs, even in cases where the successful party is absolutely entitled to costs.

In Tennessee, there is much less reason for retaining jurisdiction in such a case; for, under our statute at this time, no party is entitled to costs as a matter of right in any civil action.

By chapter 107 of the Acts of 1917, it is provided that in all civil cases the presiding judge is authorized to apportion the costs as in his discretion the equities require or demand.

This statute makes the rule formerly prevailing in courts of equity as to costs applicable to all civil suits in courts of law as well as equity.

This court long since held that an appeal did not lie in an equity case to review the discretion of the Chancellor on the question of costs unless there was a clear case of abuse. *State and County of Tennessee v. Lewis*, 10 Lea (78 Tenn.), 168.

The reasoning of the above case would apply since the act of 1917 to appeals, appeals in error, and writs of

State ex rel. v. Bush.

error from all the inferior courts; since the taxation of costs is discretionary now with the lower courts in all cases, we could not review their action nor entertain an appeal for that purpose alone except under very extraordinary circumstances.

The relators cite many authorities upon their brief to the effect that the expiration of the official term does not abate proceedings against an officer, and that an appellate court will retain jurisdiction and determine such cases although the term has expired. The cases relied on are *Daugherty v. Nagel*, 27 Idaho, 511, 149 Pac., 729; *Albright v. Territory*, 13 N. M., 64, 79 Pac., 719, 11 Ann. Cas., 1165; *People ex rel. Swann v. Loomis*, 8 Wend. (N. Y.), 396, 24 Am. Dec., 33; *Hammer v. State ex rel. Richards*, 44 N. J. Law, 667; *Hunter v. Chandler*, 45 Mo., 452; *Commonwealth ex rel. v. Smith*, 45 Pa., 59; *People v. Hartwell*, 12 Mich., 508, 86 Am. Dec., 70.

We have examined these cases and many others. All of them were *quo warranto* proceedings based on the statute of 9 Anne, Cas. 20, section 5, or on like statutes of the different States. In all these cases, the plaintiffs or relators were absolutely entitled to recover costs if successful, and in all of them the usurping officials whose terms had expired were subject not only to removal, but to fine, and, under some of the statutes, to a judgment for damages in favor of the contesting relator.

As said by the supreme court of Michigan in *People v. Hartwell*, supra, relied on by the relators here, responding to a motion to dismiss the appeal: "If the only object of the proceedings was to oust the incumbent, there would be great propriety in granting the motion."

State ex rel. v. Bush.

Since our Ouster Law, as heretofore pointed out, carries no fine or penalty, and the relators have no absolute right to costs, the cases cited by the relators are not at all in point.

It is insisted, however, that, should the court hold as heretofore indicated, it would be possible for any unworthy official to resign pending ouster proceedings and thus defeat the judgment of removal.

This argument is ill founded. It assumes that such officer's resignation will be accepted by the authority authorized to select his successor. We cannot suppose that a resignation would be accepted under such circumstances. It is well settled that a resignation is not complete until accepted by competent authority, and that "the right to resign will be denied, especially where a resignation is hastily made for the purpose of thwarting litigation." 22 R. C. L., 557; *Badger v. United States*, 93 U. S., 559, 23 L. Ed., 991; *State v. Rose*, 74 Kan., 262, 86 Pac., 296, 6 L. R. A. (N. S.), 843, 10 Ann. Cas., 927; *State v. McDaniel*, 22 Ohio St., 354.

It is also argued that the conclusion we have reached, if announced as the law, will put it in the power of unworthy officers to delay proceedings against them until their terms have expired, and thereby escape the consequence of suits under the Ouster Law.

We think no such danger is likely to arise. By the provisions of chapter 11 of the Acts of 1915, the courts are required to expedite and give preference to cases arising thereunder; and, under such provisions, it is impossible to so delay the trial of such a case seasonably brought.

Proceedings under the Ouster Act should never be brought unless there is a clear case of official dereliction.

State ex rel. v. Bush.

This is a very drastic statute and should not be invoked except in plain cases that can be certainly proved. There is no excuse for instituting an ouster suit for purposes of inquisition and as a fishing expedition, and it is only cases brought under such auspices that the relators will be at much difficulty in developing.

For the reasons heretofore indicated, we are of opinion that the motion to dismiss this appeal must be granted. Since the matter of costs in the lower courts is discretionary, we feel that we cannot entertain an appeal merely to review the question of the taxation of costs, unless the lower court has greatly abused its discretion, or unless some important principle of law is involved. The case before us does not present either of these considerations. The matters submitted to the Chancellor below were debatable, and this court has construed the Ouster Law in several opinions, and no further expression on the subject is at present required from us.

State ex rel. v. Howard, 139 Tenn., 73, 201 S. W., 139, in which the court passed, on the merits, after the official term expired, arose under section 5175 of Thompson's Shannon's Code, prior to the act of 1917. The relator was entitled to costs as a matter of right, and there was also an important legal principle to be settled.

Our action herein is well supported by a line of mandamus cases involving costs only in the appellate courts. *Tabor v. Hipp et al.*, 136 Ga., 123, 70 S. E., 886, Ann. Cas., 1912C, 246; *Norwood v. Clem*, 143 Ala., 556, 39 So. 214, 5 Ann. Cas., 625. See authorities collected in notes under these cases in 24 Ann. Cas., 246, and 5 Ann. Cas., 625.

Let the appeal be dismissed.

Sims v. Knoxville Ry. & Light Co.

H. BEN SIMS v. KNOXVILLE RAILWAY & LIGHT CO.

(Knoxville. September Term, 1918.)

1. CARRIERS. Passengers. When relation ceases.

Where the passenger steps from the car to the street, with intention of resuming his journey immediately on foot or by means other than the car, the relation of a carrier and passenger ceases. (*Post*, pp. 240, 241.)

Cases cited and approved: Street Railroad v. Boddy, 105 Tenn., 666; Keator v. Scranton Traction Co., 191 Pa., 102; Blomsness v. Puget Sound Electric R. Co., 47 Wash., 620.

2. CARRIERS. Treatment of passengers. Contract.

A passenger upon a street railway car is entitled on his journey to civil treatment from defendant's servants in charge of the car as a part of the contract of carriage. (*Post*, p. 241.)

Case cited and approved: Traction Co. v. Lane, 103 Tenn., 376.

3. CARRIERS. Passengers. Termination of relation. Tort of servant.

Where a passenger upon a street railroad car felt that he had been mistreated by the conductor after alighting from the front of the car according to a rule of the company, necessarily passed to the rear to get the number of the conductor to make his complaint, and while doing so, was assaulted by the conductor and injured, the company was liable. (*Post*, pp. 241, 242.)

FROM KNOX

Appeal from the Circuit Court of Knox County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—HON. VON A. HUFFAKER, Judge.

FOWLER & FOWLER, Wm. BAXTER LEE and J. M. MEEK, for appellant.

Sims v. Knoxville Ry. & Light Co.

CHAS. H. SMITH, for appellee.

MR. JUSTICE GREEN delivered the opinion of the Court.

This suit was brought to recover damages, for injuries received by plaintiff at the hands of a conductor of one of the defendant's cars. At the conclusion of plaintiff's proof, the trial judge directed a verdict in favor of defendant, and judgment was entered accordingly. This judgment was reversed by the court of civil appeals.

We have granted defendant's petition for *certiorari* and heard full argument.

Plaintiff's evidence tends to show that he boarded a car of defendant in Knoxville with a party of relatives; that there was some discussion between him and the conductor as to the use of certain transfers plaintiff had; and that the conductor addressed offensive and profane language to him. The fares were adjusted, however, and plaintiff and his party proceeded into the car and took their seats. When the car reached their destination, these passengers alighted in the street, going out the front end of the car, according to custom, and plaintiff, conceiving that he had been insulted and mistreated by the conductor, passed at once alongside, before the car had started, to the rear platform, where the conductor was stationed, in order that he might get the latter's number, and report him to the managing officials of the company.

Plaintiff apprised the conductor of this intention, and then, according to plaintiff's evidence, the conductor, without other provocation, immediately descended from the platform, and made a violent assault on plaintiff

Sims v. Knoxville Ry. & Light Co.

with a large metal handle bar used for opening the car door, inflicting severe injuries.

The determinative inquiry, it is conceded, is whether plaintiff had ceased to be a passenger at the time of this assault.

The general rule is that one ceases to be a passenger of a street car company when he steps from the car to the street. The street is a public place, over which the carrier has no control, and when a passenger safely alights there, his relation with the carrier determines, and he becomes merely a traveler on the highway. *Street Railroad v. Boddy*, 105 Tenn., 666, 58 S. W., 646.

This case and others sustaining the general rule are cases, however, where the passenger alights with the intention of resuming his journey immediately, on foot, or by other means than the car. They are cases in which the passenger at once becomes a traveler on the highway, and thus severs his relation with the street car company.

Even under such circumstances, it would seem that if injured before passing away from the car by negligent efforts of the servant of the carrier to reverse the trolley pole, he might still be regarded as a passenger entitled to protection from such an act as this. *Keator v. Scranton Traction Co.*, 191 Pa., 102, 43 Atl., 86, 44 L. R. A., 546, 71 Am. St. Rep., 758.

The Washington court soundly held, as we think, that one who paused in the street after alighting from a car and continued to demand a transfer, to which he was entitled, but had not procured on the car by reason of some misunderstanding, was still to be regarded as a passenger, and for an assault made on him so situated by the conductor, the company was liable. *Blomsness v.*

Sims v. Knoxville Ry. & Light Co.

Puget Sound Electric R. Co., 47 Wash., 620, 92 Pac., 414, 17 L. R. A. (N. S.), 763, 14 L. R. A. (N. S.), 213.

There are numerous cases where a street car company has been held liable for its servant's assault on a passenger who had lighted in the street, when the assault grew out of and was a continuation of a difficulty on the car. Note, 17 L. R. A. (N. S.), 768. It is fair to say, however, that on the record before us, there was no immediate connection between the trouble that occurred when plaintiff entered the car and the subsequent attack on him by the conductor. This prior dispute subsided and plaintiff rode several miles before he left the car and was assaulted.

It is obvious from the foregoing that even in street car cases, the passenger does not in every instance lose all his rights the moment he steps into the highway. There are exceptions to the rule, and we think the present controversy should be made an exception.

The plaintiff was entitled on his journey to civil treatment from defendant's servants in charge of the car. This was part of the contract of carriage. *Traction Co. v. Lane*, 103 Tenn., 376, 53 S. W., 557, 46 L. R. A., 549.

Such an obligation is generally recognized by our transportation companies, who in their advertising matter and by signs posted in their vehicles and waiting rooms invite their passengers to report any discourteous treatment by employees. At any rate, the obligation exists and the plaintiff was entitled to procure the number of this employee, make complaint of his conduct, and obtain reparation for the same, if of sufficient legal gravity.

 Sims v. Knoxville Ry. & Light Co.

According to the evidence of plaintiff he did not alight from the car with the intention of immediately resuming his journey. He did not at once become a traveler on the highway. He stepped from the front platform with the idea of passing alongside of the car to the rear platform to get the conductor's number. He did this instantly before the car started, and in so doing we think he was taking a proper and necessary step toward the enforcement of his rights under the contract of carriage between himself and the defendant. The entire occurrence was but an unpleasant incident of the particular transportation, an inseparable detail of this passage.

If, as suggested by counsel for plaintiff, the latter had, before alighting, walked through the car to the rear platform to obtain the conductor's number, and had been attacked under these circumstances, it would scarcely have been insisted that the company was not liable. It can make no difference to the company that in compliance with its rules to promote convenience in loading and unloading, plaintiff went out through the front and walked back alongside the car for the purpose indicated.

The facts of this case are novel, but we are satisfied that the conclusion reached is sound, and a contrary holding would be detrimental to good service and the interests of the traveling public.

On the foregoing theory of his case, which was supported by his proof, it was error to direct a verdict against plaintiff, and the judgment of the court of civil appeals, which reversed the judgment below and remanded the case for trial, will be affirmed.

State ex rel. v. American Trust Co.

STATE, by O. S. HAUK, REVENUE AGENT, *v.* AMERICAN
TRUST CO. *et al.*

(*Knoxville. September Term, 1918.*)

TAXATION. Mortgage tax. Exemption from *ad valorem* tax. Constitutionality.

Acts of 1917, chapter 70, imposing tax on mortgages and deeds of trust to be levied "in lieu of all other taxes," held unconstitutional, as exempting registered mortgages and deeds of trust from *ad valorem* taxation in violation of Constitution, article 2, section 28.

Act cited and construed: Acts 1917, ch. 70:

Cases cited and approved: Union Trust Co. *v.* Detroit, 170 Mich., 692; Mutual Benefit Life Ins. Co. *v.* Martin County, 104 Minn., 179; People *v.* Gass, 206 N. Y., 609; Pocahontas Consolidated Collieries *v.* Commonwealth, 113 Va., 108; State *v.* Alabama Fuel & Iron Co., 188 Ala., 487; Wheeler *v.* Weightman, 96 Kan., 50; Keith *v.* Funding Board, 127 Tenn., 441; State *v.* Alston, 94 Tenn., 674; Railroad *v.* Harris, 99 Tenn., 684; Bank *v.* Memphis, 101 Tenn., 154; Carroll *v.* Alsup, 107 Tenn., 257.

Case cited and distinguished: Telegraph Co. *v.* State & County, 68 Tenn., 509.

Constitutions cited and construed: § 168 (1902); § 28, art. 2 (Tenn.).

FROM GREENE.

Appeal from the Chancery Court of Greene County.—
Hon. HAL H. HAYNES, Chancellor.

Roy A. JOHNSTON, for appellant.

Cox & TAYLOR and SUSONG & BIDDLE, for appellees.

State ex rel. v. American Trust Co.

MR. JUSTICE GREEN delivered the opinion of the Court.

The bill in this cause was filed by the State, through one of its revenue agents, to collect from the defendant what is known as the "mortgage registry" tax imposed by chapter 70 of the Acts of 1917. The chancellor held this section of the statute invalid, and the State has appealed.

The section is as follows:

"Tax on Mortgages, etc. That prior to the recording by the registers of the several counties of the State of any mortgage, or deed of trust, executed as a pledge, mortgage, or conveyance in trust of any real or personal property situated in the State of Tennessee, or any interest in any real or personal property situated in the said State, to secure the payment of any indebtedness, there shall be levied and paid, in lieu of all other taxes, a State tax of 15c on each \$100 or portion thereof, of the amount of the indebtedness so secured, which tax shall be collected by the clerk of the county court of the county in which said property is located, and the county registers of the several counties of the State are hereby required not to record any such instrument until the clerk of the county court of the county in which said instrument is offered for record certifies on said instrument that said tax has been paid. The tax herein prescribed shall be paid by the holder or owner of the indebtedness secured by the instrument offered for record; provided that this tax shall not apply to loans under \$1,000."

We regret that we are unable to agree with the legislative department as to the constitutionality of this enactment.

State ex rel. v. American Trust Co.

After a full consideration, we are forced to the conclusion that the result attained by the chancellor was inevitable.

In view of the difficulty in reaching mortgages or the owners thereof for the assessment of such property, several of the States have passed statutes similar to the above, and in a number of the States, these statutes have been upheld.

Such acts have been sustained in Michigan, *Union Trust Co. v. Detroit*, 170 Mich., 692, 137 N. W., 122; in Minnesota, *Mutual Benefit Life Ins. Co. v. Martin County*, 104 Minn., 179, 116 N. W., 572; in New York, *People v. Gass*, 206 N. Y., 609; 100 N. E., 404; in Virginia, *Pocahontas Consolidated Collieries v. Commonwealth*, 113 Va., 108, 73 S. E., 446; in Alabama, *State v. Alabama Fuel & Iron Co.*, 188 Ala., 487, 66 So. 169, L. R. A., 1915A, 185, Ann. Cas., 1916E, 752.

In Kansas, a similar statute has been held invalid in view of a constitutional provision requiring a uniform and equal rate of assessment and taxation. *Wheeler v. Weightman*, 96 Kan., 50, 149 Pac., 977, L. R. A., 1916A, 846.

In Michigan, Minnesota, and doubtless in New York, this tax is sustained as a property tax. It is conceded by the attorneys for the State herein that the tax cannot be sustained as a property tax in Tennessee.

In Alabama and Virginia, the tax is sanctioned as a privilege tax, which the courts of these States are able to do by reason of constitutional provisions differing from ours.

It will be observed that the statute quoted provides that this mortgage registry tax shall be "in lieu of all

State ex rel. v. American Trust Co.

other taxes." It therefore exempts mortgages and deeds of trust from all other taxation. The act can have no other construction. In several sections of the act it is provided that privilege taxes imposed shall be in lieu of all other taxes except *ad valorem* taxes. In this section, however, the tax is unqualifiedly declared to be in lieu of all other taxes, and we must conclude that it was the intention to exempt registered mortgages and deeds of trust from *ad valorem* taxation. Such is the provision of similar statutes in other States to which reference has been made, and after which this legislation is fashioned.

In Alabama, the Constitution is construed to permit the exemption of all property of a particular kind from taxation, and the validity of an exemption there is only a question of reasonable classification. *State v. Alabama Fuel & Iron Co.*, supra.

Likewise, the Virginia Constitution provides that "all taxes, whether State, local, or municipal, shall be uniform upon the same class of subjects." Constitution 1902, section 168.

Our constitutional provision on the subject of taxation, as will be recalled, is quite different, and the legislature is without power to exempt from taxation any property except as specified in that instrument.

Section 28 of article 2 of the Constitution of Tennessee is as follows:

"*Taxation, Merchant's and Privileges.*—All property, real, personal or mixed, shall be taxed, but the legislature may except such as may be held by the State, by counties, cities or towns, and used exclusively for public or corporation purposes, and such as may be held and

State ex rel. v. American Trust Co.

used for purposes purely religious, charitable, scientific, literary or educational, and shall except one thousand dollars' worth of personal property in the hands of each taxpayer, and the direct product of the soil in the hands of the producer, and his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the State. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value, but the legislature shall have power to tax merchants, peddlers and privileges in such manner as they may from time to time direct. The portion of a merchant's capital used in the purchase of merchandise sold by him to nonresidents and sent beyond the State, shall not be taxed at a rate higher than the *ad valorem* tax on property. The legislature shall have power to levy a tax upon incomes derived from stocks and bonds that are not taxed *ad valorem*. All male citizens of this State over the age of twenty-one years, except such persons as may be exempted by law on account of age or other infirmity, shall be liable to a poll tax of not less than fifty cents nor more than one dollar per annum. Nor shall any county or corporation levy a poll tax exceeding the amount levied by the State."

The court has quite recently considered at length the power of the legislature with reference to the exemption of property from taxation, and the cases have been fully reviewed in *Keith v. Funding Board*, 127 Tenn., 441, 155 S. W., 142, Ann. Cas., 1914B, 1145. In that case it was held, over the protest of two of us, that the legislature

State ex rel. v. American Trust Co.

was without power to free the bonds of the State of Tennessee from taxation.

It has never before been suggested in this jurisdiction that the legislature by imposing a small privilege tax upon the registration of the evidence of title to such property might exempt from *ad valorem* taxation so much of our wealth as is represented by mortgages and trust deeds, privately owned.

Treating the act in question as an attempt to impose a registration privilege tax, it doubtless might have been sustained if it had not undertaken to exempt mortgages and deeds of trust from taxation. This is not a privilege, as of carrying on a business or occupation, but a privilege of exercising a right not a natural right, the right of registration. In this view, the act might be upheld as was the statute imposing a privilege tax on the right of succession or inheritance in *State v. Alston*, 94 Tenn., 674, 30 S. W., 750, 28 L. R. A., 178, or as was the foreign corporation transfer tax in *State ex rel. v. L. & N. R. Co.*, 139 Tenn., 406, 201 S. W., 738.

In neither of these instances, however, was the property inherited or the property transferred sought to be excepted by the statutes from *ad valorem* taxation.

The privilege of registering a mortgage or trust deed and the ownership of a mortgage or trust deed are two different things.

This court has formerly said:

"The privilege is one thing, the property owned by the party having the privilege another, each of which may be taxed, the one as privilege, the other as property, according to its value, as provided by the

State ex rel. v. American Trust Co.

Constitution.'' *Telegraph Co. v. State & County*, 9 Baxter (68 Tenn.), 509, 40 Am. Rep., 90.

The difference between the exercise of a privilege and the ownership of property is further illustrated in *Railroad v. Harris*, 99 Tenn., 684, 43 S. W., 115, 53 L. R. A., 921, *Bank v. Memphis*, 101 Tenn., 154, 46 S. W., 557, and *Carroll v. Alsup*, 107 Tenn., 257, 64 S. W., 193,

So, if it be conceded to have been within the power of the legislature to lay this privilege tax upon the registration of mortgages and trust deeds, still it cannot, under our Constitution, be permitted to exempt such property from *ad valorem* taxation.

The privilege and the property here are things so entirely separated that the privilege cannot be stretched to cover the property from the tax "according to its value."

The decree of the chancellor will be affirmed, and the bill dismissed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
WESTERN DIVISION.

JACKSON, APRIL TERM, 1919.

CITY OF MEMPHIS *v.* MARY MARTIN HILL.

(*Jackson*, April Term, 1919.)

1. STATUTES. Knowledge of legislature. Presumption.

In adopting a plan or scheme by which the city of Memphis should proceed in its local improvements, with attendant assessments for the benefits accruing, it is to be presumed that the legislature was aware of those methods of special assessments constantly adopted and generally in operation throughout the States of the Union. (*Post*, pp. 255, 256.)

Acts cited and construed: Acts 1907, ch. 341; Acts 1909, ch. 109; Acts 1913, ch. 244.

2. MUNICIPAL CORPORATIONS. Improvements. Assessments. Statutes. Strict construction.

The purpose of Acts 1907, chapter 341, as amended by Acts 1909, chapter 109, and Priv. Acts 1913, chapter 244, constituting the abutting property law for the city of Memphis being to provide for a species of taxation, its intendment must be strictly construed against the power and in favor of the citizen affected. (*Post*, pp 256-260.)

City of Memphis v. Hill.

3. MUNICIPAL CORPORATIONS. Street improvements. Assessments. Front-foot rule.

Under Acts 1907, chapter 341, as amended by Acts 1909, chapter 109, and Private Acts 1913, chapter 244, the city of Memphis in levying special assessment is authorized to proceed solely against property abutting the street or part of the street to be improved, and assessments are to be made by the front-foot rule. (*Post*, pp. 256-260.)

Cases cited and approved: *Memphis v. Bing*, 94 Tenn., 644; *Chattanooga v. Raulston*, 117 Tenn., 569; *Scovill v. City of Cleveland*, 1 Ohio St., 126; *Northern Indiana R. R. Co. v. Connelly*, 10 Ohio St., 159; *Kendig v. Knight*, 60 Iowa, 29; *City of St. Louis v. Juppier*, 3 S. W. (Mo.), 401; *In re Morewood Avenue*, 159 Pa., 20; *In re 54th Street*, 165 Pa., 8; *Ryan v. Town of Sumner*, 17 Wash., 228.

4. MUNICIPAL CORPORATIONS. Street improvements. Assessment. Property subject.

Where an assessment in proportion to frontage is the mode prescribed by the legislature, property remote from the actual improvement and property not abutting upon the improvement is not subject to assessment. (*Post*, pp. 260, 261.)

Cases cited and approved: *Roberts v. City of Evanston*, 218 Ill., 296; *Shurtleff v. Chicago*, 190 Ill., 473; *Langlois v. Cameron*, 201 Ill., 301; *Chillicothe v. Henry*, 136 Mo. App., 468; *City of Cincinnati v. Batsche*, 52 Ohio St., 324; *Wilbur v. Springfield*, 123 Ill., 395; *Barber Asphalt Paving Co. v. Kiene*, 99 Mo. App., 528; *City of Springfield v. Green*, 120 Ill., 269.

5. MUNICIPAL CORPORATIONS. Assessments. Benefits. Nonabutting property.

That the property of respondent or other property adjacent to the improvement is benefited by the same, and in the same manner, and to the same extent, as property abutting immediately upon the improvement, affords no reason for a construction of Acts 1907, chapter 341, as amended by Acts 1909, chapter 109 (Private Acts 1913, chapter 244), which is not clearly comprehended by its terms. (*Post*, pp. 261-264.)

City of Memphis v. Hill.

Cases cited and approved: *Bank v. Memphis*, 101 Tenn., 158; *Railroad Co. v. Williams*, 101 Tenn., 146; *Harriman v. Yonkers*, 181 N. Y., 27,

Cases cited and distinguished: *Express Co. v. Patterson*, 122 Tenn., 293; *Halpin v. Campbell*, 71 Mo. 493.

FROM SHELBY.

Appeal from the Circuit Court of Shelly County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court—Hon. A. B. PITTMAN, Judge.

GATES & MARTIN, for Mary Martin Hill.

H. J. LIVINGSTON and C. M. BRYAN, for City of Memphis.

MR. JUSTICE BACHMAN, delivered the opinion of the Court.

Mrs. Mary Martin Hill, the respondent herein, is the owner of six lots of land, aggregating some six hundred feet frontage, abutting on North and South, Third street, between Adams and Union avenues, in the city of Memphis. In August, 1912, by appropriate action of the city authorities, Third street between Adams and Union avenues was created an improvement district, and for the improvements then made the property, abutting thereon was assessed at the rate of \$5.36 per front foot, Mrs. Hill paying as her proportionate share the sum of \$3,255.44. North and South Third street extends southwardly from Chelsea avenue to Adams avenue and there terminates. Rayburn boulevard extends northwardly from Calhoun

City of Memphis v. Hill.

avenue to Beale avenue, there ending at a point some one thousand, one hundred feet from and almost directly south of the southern terminus of North and South Third street. There exists no street through the one thousand, one hundred feet separating North and South Third street and Rayburn boulevard. Desiring to extend Third street southwardly beyond Union avenue and though the intervening property to connect with Rayburn boulevard, thus making of Third street a continuous thoroughfare, the city of Memphis in September, 1917, finally passed improvement ordinance No. 374, which created an improvement district, embracing North and South Third street between Adams and Union avenues, the new street to be opened between Union and Beale avenues and Rayburn boulevard between Beale and Calhoun avenues. It was not contemplated that there should be any physical improvement of that part of North and South Third street between Adams and Union avenues, upon which the property of respondent abuts, the same being in good, serviceable condition, but to defray the expense of opening up the new street contemplated, acquiring the necessary property, removing buildings, drainage, and paving, an assessment was ordered on all abutting property within the limits of the prescribed district, the maximum rate per front foot estimated to be \$6.79. Before final confirmation of the ordinance authorizing the improvements Mrs. Hill, by counsel, appeared before the board of commissioners and protested the same, challenging its legality upon grounds dealing with the right of the city to make the proposed assessments upon her property, no question being made as to the correctness of the

City of Memphis v. Hill.

procedure in the passage of the ordinance. Her protest having been overruled, the proceedings of the board of commissioners were reviewed in the circuit court upon petition for *certiorari* where the petition was dismissed, the judgment of the circuit judge being accompanied by a finding of law and fact which succinctly states the controversy.

In addition to the facts heretofore stated, it was found by the circuit judge that the council had due authority to pass the ordinance in question; that in providing for the assessments to be made thereunder it had approximated as nearly as possible the property obviously benefited; that, while other property not included in the district would be benefited, the proposed improvement would materially enhance the value of all property within the limits of the district; and that the enhancement in value of each particular piece of abutting property would materially exceed the amount of the assessment ordered upon it.

Upon appeal to the court of civil appeals the judgment of the circuit court was reversed and the case is before us upon petition by the city of Memphis for writs of *certiorari*.

In the able and exhaustive briefs of counsel there are presented fundamental questions going to the validity of special assessments for local benefits upon which there now exists little divergence of authority, and it is not our purpose to discuss those principles of special assessments underlying and necessary to the validity of such assessments generally, but which, in our view of this case, are not involved in its determination.

The authority of the legislature to empower the city of Memphis to proceed with the extension and improve-

City of Memphis v. Hill.

ment of its streets, and to provide for the cost thereof, by assessments on the property benefited, is not open to question. That the legislature could in its discretion have adopted one or more of several modes of establishing the proper correlation between such assessments and the benefits conferred is well settled.

In the determination of the case we are not concerned with what powers might have been conferred upon the city of Memphis authorizing the levying or proportionate assessments for the improvements of its streets but rather what mode of procedure for the equitable distribution of such burdens has actually been designated as proper and suitable. Following the determination of this question, it is to be seen whether or not the proceedings herein considered come within the delegated method.

In adopting a plan or scheme by which the city of Memphis should proceed in its local improvements, with attendant assessments for the benefits accruing, it is to be assumed that the legislature was aware of those methods of special assessments constantly adopted and generally in operation throughout the States of the Union. Certainly it was aware of two predominant plans, viz. by the front-foot method, and assessments in proportion to benefits had, both recognized as securing under differing conditions, the most approximate measurement of assessments and benefits. The authority to levy the special assessments complained of upon the property of respondent, if found to exist, is contained in chapter 341 of the Acts of 1907, as amended by chapter 109 of the Acts of 1909, and chapter 244 of the

City of Memphis v. Hill.

Private Acts of 1913, the several acts together constituting the abutting property law for the city of Memphis.

The purpose and authority of the original act (chapter 341 of the Acts of 1907), as expressed in its caption, is as follows:

"An act to empower municipalities having a population exceeding 100,000 inhabitants by the federal census of 1900 or any subsequent federal census to open, extend, widen, grade, pave, macadamize, or otherwise improve streets, alleys, and highways; to levy and collect special taxes and local contributions on real estate abutting the same; to authorize the issuance of certificates of indebtedness to pay for the same; to provide for the redemption of such certificate; and to authorize the creation of improvement districts."

Having in mind that the purpose of the original act, with its amendments, is to provide for a species of taxation, and that, in accord with the recognized rules of construction, its intendments must be strictly construed against the power and in favor of the citizen affected (*Memphis v. Bing*, 94 Tenn., 644, 30 S. W., 745; *Chattanooga v. Raulston*, 117 Tenn., 569, 97 S. W., 456), we are of opinion that in the levying of special assessments the city is authorized to proceed solely against property abutting the street or part of the street to be improved, and that the assessments are to be made by the front-foot rule. An examination of the language and terms constantly recurring throughout the acts admits of no other conclusion.

To empower municipalities to open or otherwise improve streets; to levy and collect special taxes . . . on real estate abutting the same—so reads the caption

City of Memphis v. Hill.

of the original act. In each and every instance throughout the several provisions of the acts, where it is sought to designate or describe the property to be specially assessed, the language is practically identical.

Section 1 of the Acts of 1907 provided that upon a petition signed by the owner or owners of sixty per cent. of the frontage of the lots or parcels of land abutting on such portion of any street, highway, or alley, as set out in the petition, within the corporate limits of such municipality, the legislative body was authorized to provide for the improvement of such street, and the making of special levies or assessments upon the lands abutting on such street, highway, or alley to be improved.

It is provided in section 3 that before any work shall be done or public improvement authorized, the cost of which is proposed to be assessed against the property abutting on said street, highway, or alley to be improved, it is the duty of the legislative body to adopt an ordinance stating the general character of improvement, and to name the location and terminal points thereof, and the streets, alleys, or other highways or parts thereof along which it is to be constructed.

The amendatory acts of 1909 and 1913 in no wise enlarge the purview of the original act, in so far as the property to be assessed or mode of assessment is concerned.

It is in section 5 of the original act that the designation of property subject to assessment and the manner of levying the same is perhaps most clearly expressed. The clear import of the language is simply that the properties abutting the street or part of the street im-

City of Memphis v. Hill.

proved shall be assessed according to their respective frontages.

We can find in the enactment authority for the assessment of no other property than that abutting the street improved or the part of a street improved; in other words, property abutting the improvement sought to be made. As is well expressed in *Scovill v. City of Cleveland*, 1 Ohio St., 126, and approved in *Northern Indiana R. R. Co. v. Connelly*, 10 Ohio St., 159, where the authority of the city was "to levy a special tax, to defray the expense of grading, paving or otherwise improving any road, street," etc., "by a discriminating assessment upon the land and ground abounding and abutting upon such road," etc., "or near thereto, in proportion to the benefit accruing therefrom to such ground or land," in response to an attack made upon a special assessment sought to be levied thereunder in that the same was limited to abutting property or near thereto, the court said:

"We think the charter has controlled their discretion in a manner entirely consistent . . . with their action by requiring them to make the assessment upon land abutting the improvement 'or near thereto.' If the council have power under the general words 'any street,' . . . in the first clause of the section, to improve a part of the street, as appears to be conceded, it seems to us clear that the words in the next clause, 'grounds bounding and abutting on such street,' confine the assessment to ground on the part of the street improved. If part only can be lawfully improved, that part only can be lawfully taxed; and this we are satisfied is the true meaning of the law."

City of Memphis v. Hill.

It is to be found that the construction which we give to the language of the act is in accord with the authorities:

"Where the statute limits the property which may be subject to assessment to that which is abutting or contiguous or adjoining or fronting, only property so situated with reference to the improvement may be assessed." 28 Cyc., 1123 (III).

So also from the same authority: "As a general rule it is held that where the statute provides that property abutting on the street shall be assessed for the improvement that property which abuts on the improvement only may be assessed." 28 Cyc., 1126 (VII).

In Elliott on Roads and Streets (3d Ed.), section 683, the principle is summarized as follows:

"It is only such property as the statute authorizes the local authorities to lay an assessment upon that can be made liable for the expense of constructing, improving, or repairing a road or street. It is not within the authority of the local or municipal officers to assess property not made subject to assessment by statute, nor can they assess more property than the statute authorizes. Whatever part of a citizen's property the statute makes liable to the assessment, and no more, may be made to bear the expense of the improvement."

See, also, *Kendig v. Knight*, 60 Iowa, 29, 14 N. W., 78; *City of St. Louis v. Juppier*, (Mo.), 3 S. W., 401; *In re Morewood Avenue*, 159 Pa., 20, 28 Atl., 123, 132; *In re 54th Street*, 165 Pa., 8, 30 Atl., 503; *Ryan v. Town of Sumner*, 17 Wash., 228, 49 Pac., 487.

Had it been the legislative intent to provide for the assessment of other property than that fronting on the

City of Memphis v. Hill.

street or part of the street improved, it may be assumed that such intention would have been made clearly manifest.

As hereinabove stated, the method of assessment legalized by the act is according to frontage, and while it is true that an apportionment on the theory of benefits may be levied upon property benefited, but not contiguous to the improvement (Page and Jones Special Assessments, section 619; *Roberts v. City of Evanston*, 218 Ill., 296, 75 N. E., 923; *Shurtleff v. Chicago*, 190 Ill., 473, 60 N. E., 870), it is to be found that where an assessment in proportion to frontage is the mode prescribed by the legislature, property remote from the actual improvement, property not abutting upon the improvement, is not subject to assessment.

"Provisions are frequently found for assessing property in proportion to its frontage. Such provisions ordinarily restrict the assessment district to property abutting upon such improvement and bounded by the lines thereof. Property separated from the improvement by other property is not subject to assessment under such provision." Page and Jones, Special Assessments, 625; Cooley on Taxation (3d Ed.), 1222; 28 L. R. A. (N. S.) 1192. To the same effect, *Langlois v. Cameron*, 201 Ill., 301, 66 N. E., 332; *Chillicothe v. Henry*, 136 Mo. App., 468, 118 S. W., 486; *City of Cincinnati v. Batsche*, 52 Ohio St., 324, 40 N. E., 21.

"If the legislature has provided for the apportioning of the assessments according to the front-foot rule, this seems to be held, in the great majority of jurisdictions, to be a valid and conclusive determination by the

City of Memphis v. Hill.

legislature that the benefits conferred by the improvement are conferred according to frontage, and accordingly such a method of assessment is held to be a valid and proper one." Page and Jones, 698; *Wilbur v. Springfield*, 123 Ill., 395, 14 N. E., 871; *Barber Asphalt Paving v. Kiene*, 99 Mo. App., 528, 74 S. W., 872; *City of Springfield v. Greene*, 120 Ill., 269, 11 N. E., 261.

The correctness of the principle stated by the authorities above is, in our judgment, founded upon the nature of the assessment itself—that is, in proportion to frontage—being, as it is, but an arbitrary method, more nearly approaching than any other the due relation of benefits and assessments only where the property burdened is contiguous to the improvements.

Where the property sought to be assessed does not abut upon the improvement, and is separated therefrom by other property, the front-foot rule loses its efficiency, and is rarely employed as a measurement by which equality of assessment may be even approximately gauged. In the instant case the authorization for assessment according to frontage precludes a procedure by the municipal authorities by any other means. It is a legislative declaration of the sole means deemed equitable, and until there is presented a case of palpable injustice by its operation it is the exercise of a legislative discretion with which the courts will not interfere.

That the property of respondent or other property adjacent to the improvement is benefited by the same, and in the same manner and to the same extent as property abutting immediately upon the improvement, as is argued by counsel for the city, and should be assessed therefor, affords no reason for the construction

City of Memphis v. Hill.

of the act clearly not comprehended by its terms. The legislative declaration, as shown in the act, is that the municipal authorities of the city of Memphis shall have the power to assess property abutting the improved portions of its thoroughfares in accordance with its frontage thereon. It is determined for the authorities that, in accord with that rule, benefits to the properties so situated are presumed.

As stated in Hamilton on Special Assessments, section 221:

“Apportioning the cost by the frontage on the improvement is adopted by the legislature as constituting, in the judgment of its members, an apportionment in proportion to benefits as nearly as is reasonably practicable, and, as we understand it, is substantially the view taken by the authorities.”

There is no authority granted to otherwise determine what property is benefited, and it cannot be presumed that such determination was left to the arbitrary judgment of the city authorities, with no prescribed method of ascertaining the extent of, and consequent assessment for, such benefits. Had the Legislature intended to authorize the apportionment of assessments according to benefits, or in some other method than that of frontage, certain it is that some vehicle or scheme for the determination of an approximate adjustment would have been devised by the legislature, with direction for the enforcement of its provisions by the municipal authorities.

In *Express Co. v. Patterson*, 122 Tenn., 293, 123, S. W., 357, in considering a provision seeking to tax the intangible property of foreign corporations in Tennessee,

City of Memphis v. Hill.

and declaring the attempted taxation invalid, the court said:

"This includes the intangible property of all corporations, and subjects it to taxation; but this is not sufficient. The requirement that the legislature provide a mode for the ascertainment of the value of property—the assessment of it—so that it may be assessed according to its value, and that the taxes collected from it be equal and uniform with those assessed upon other property of the same value, is equally mandatory, and before any property can be valued and assessed for taxation a proper method and machinery for such valuation and assessment must be provided. *Bank v. Memphis*, 101 Tenn., 158, 46 S. W., 557; *Railroad Co. v. Williams*, 101 Tenn., 146, 46 S. W., 448."

Our construction of the act in question leaves no doubt of the invalidity of the ordinance under the authority of which the assessment of the property of the respondent herein is sought.

We are further of the opinion that the court of civil appeals was correct in assigning, as one ground of its finding that the assessment was invalid, that the property of the respondent had heretofore been assessed under the proceeding in 1912 for the improvement abutting her property. While it is true that there is no reason why property may not be assessed more than once for successive improvements, yet, where there is no limitation by the legislative authorities of the assessment of properties where a street or streets are to be improved by blocks of sections, that equality sought in special assessments may be entirely destroyed. The inequality resulting is forcibly pointed out in the case

City of Memphis v. Hill.

of *Halpin v. Campbell*, 71 Mo., 493, where the court states:

"The entire property adjoining a street is the property subject to taxation for its general improvement, and if such improvement be made in sections, and the property adjoining the first section is required to bear the entire expense of improving that section and then to bear its proportion of the expense of improving successive sections, the . . . first . . . will, in the end, have borne a proportion of the entire expenst greater than that which its value bears to that of all the property on the street."

Again, in *Harriman v. Yonkers*, 181 N. Y., 27, 73 N. E., 493, it appeared that eighty-five per cent, of the amount of the assessment against which the plaintiff sought relief was imposed for the expense of curbing and guttering a new street, and that no part of the lands of the plaintiff fronted on that street. The charter authority provided that the expense of curbing, etc., should be assessed upon lots of land fronting upon the street in proportion to their frontage. The assessment was held invalid.

Taking the present case, should the procedure here be declared valid, and the municipal authorities desire to further improve Third street, creating for that purpose several successive improvement districts, and the property of respondent was assessed to bear its proportionate share of the expense incident to each district, it would result that her property would have to bear the several burdens of successive assessments, while the last district improved would bear only one. There exists no legislative authority for such action.

The judgment of the court of civil appeals is affirmed.

Memphis St. Ry. Co. v. Carroll.

MEMPHIS ST. RY. CO. V. J. DUDLEY CARROLL.*

(Jackson, April Term, 1919.)

STREET RAILROADS. Contributory negligence. Presumption. Jury question.

Where plaintiff's deceased was killed on a cloudy misty morning by a street car, nobody seeing accident, presumption that deceased exercised due care was rebuttable, and court erred in refusing to submit contributory negligence to jury.

Cases cited and approved: Texas & Pacific Ry. Co. v. Mary Gentry, 163 U. S., 353; Baltimore & Potomac R. R. Co. v. Landrigan, 191 U. S., 461; Wabash Railroad Co. v. Rosa De Tar, 141 Fed., 932; Tomlinson v. Chicago, M. & St. P. Ry. Co., 134 Fed. 233; Rollins v. Chicago, M., St. P. Ry. Co., 139 Fed. 639; St. Louis S. F. R. Co. v. Cundieff, 171 Fed., 319.

FROM SHELBY.

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—HON. J. P. YOUNG, Judge.

McKINNEY BARTON, for plaintiff in error.

JNO E. BELL and **R. H. STICKLEY**, for defendant in error.

MR. JUSTICE BACHMAN delivered the opinion of the Court.

Shortly after 6 o'clock on the morning of January 5, 1917, L. R. Scudder was struck by a street car belonging

*Authorities passing on the question as to presumption of care of person killed at railroad crossing, are collated in a note in 4 L. R. A. (N. S.), 344.

Memphis St. Ry. Co. v. Carroll.

to the Memphis Street Railway Company, receiving injuries from which he died about midnight of the same day. The accident occurred at or near the northeast corner of Chelsea avenue and Beacon streets, east of the corporate limits of the city of Memphis. From the record no one saw the deceased immediately prior to or at the time he was struck; the jar or impact of the car with an obstruction was the first intimation to those aboard that an accident had taken place. The morning was dark, cool, and misty. The car causing the injury and subsequent death was being operated eastward from ten to thirty miles per hour over a slightly down-grade section of track. There was no large headlight, customarily used on street cars, burning at the time; a small incandescent light showed in front and the cluster lights were burning on the inside of the car.

Suit for the wrongful death of Mr. Scudder was instituted by the duly appointed administrator, J. Dudley Carroll, and upon the trial a verdict of \$15,000 was had against the railway company, which was reduced to \$10,000 upon appeal to the court of civil appeals. The case is here upon petition for *certiorari* by the railway company, a number of assignments of error being directed to the action of the court of civil appeals in its affirmance of the court below.

His honor, Judge Young, was of the opinion that there being no direct testimony as to the manner of the accident, having charged the jury that the deceased was presumably in the exercise of due care for his safety at the time of the injury, this presumption was conclusive, and the question of contributory negligence of the deceased was not submissible to the jury. We deem

Memphis St. Ry. Co. v. Carroll.

this one question determinative of the case, and will only consider it in our disposition of the same.

The logical effect of not submitting to the jury the question of contributory negligence, either approximate or remote, on the part of the deceased, was to find as a matter of fact that, circumstanced as he was, to look and listen would have availed nothing; that he could neither have seen nor heard the approach of the car. This we deem error. Where the physical facts and circumstances surrounding an injury are so clear and unambiguous that there could exist no reasonable difference of opinion as to their evidential force, or the natural conclusions to be drawn from them, they constitute a question of law for the determination of the court. Where, however, different conclusions as to the probative effect of facts or circumstances may be drawn, the question becomes one of fact which should be submitted to the jury. In the instant case the plaintiff was entitled before the jury to the reasonable presumption that the deceased was exercising reasonable care at the time of the injury causing death, this presumption arising out of the natural instinct of self-preservation, was one of fact, disputable, and stood in his behalf only so long as consistent with other evidence introduced in connection with the injury.

It appeared from the testimony of witnesses for the plaintiff that the car, at the time of the injury, could have been seen and heard for certain short distances. What weight should be given to this evidence, what effect it might have had in rebutting the presumption in the plaintiff's favor, is not for the court to say, a question of fact arose of which the jury alone was the

Memphis St. Ry. Co. v. Carroll.

sole judge under proper instruction from the court. On the question of due care on the part of the deceased, the plaintiff, because of the presumption of fact arising in favor of his intestate, occupied no higher plane in the submission of his case to the jury than did the defendant in its insistence of the immediate facts and circumstances.

While it is true that in the often cited and much-disussed case of *Texas & Pacific Ry. Co. v. Mary Gentry*, 163 U. S., 353, 16 Sup. Ct., 1104, 41 L. Ed., 186, a refusal to charge special instructions touching the contributory negligence of the deceased was held not to be error, it is likewise found that subsequent decisions of the supreme court and other appellate courts are not in uniform accord with the Gentry Case, and we are of the opinion that these, in line with the weight of authority, properly submit the question of contributory negligence where pregnant circumstances, tending to rebut the presumption of due care, are susceptible of differing conclusions, or declare contributory negligence as a matter of law where there can exist no alternative of opinion. *Baltimore & Potomac R. R. Co. v. Landigan*, 191 U. S., 461, 24 Sup. Ct., 137, 48 L. Ed., 262; *Wabash Railroad Co. v. Rosa De Tar*, 141 Fed., 932, 73 C. C. A., 166, 4 L. R. A. (N. S.), 352; *Tomlinson v. Chicago, M. & St. P. Ry. Co.*, 134 Fed., 233, 67 C. C. A., 218; *Rollins v. Chicago, M. & St. P. Ry. Co.*, 139 Fed., 639, 71 C. C. A. 615; *St. Louis & S. F. R. Co. v. Cundieff*, 171 Fed., 319, 96 C. C. A., 211.

On the facts of this case the circuit court was correct in refusing to grant peremptory instructions, but for its failure to charge the jury upon the questions of

Memphis St. Ry. Co. v. Carroll.

approximate or remote contributory negligence of the deceased, the case will be reversed and remanded for a new trial. The suggestion of a remittur by the court of civil appeals did not cure that which we conceive to have been error in the disposition of the case below; such is only permissible when the fundamental contentions of both parties have been properly placed before the jury.

The costs of the cause will be paid by defendant in error.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
IN THE
SEPTEMBER TERM, 1918.

CAMBRIA COAL Co. v. NATIONAL SURETY Co.

(*Knoxville. September Term, 1918.*)

1. PRINCIPAL AND SURETY. Contract. Rules of construction.
While the contract of an individual or voluntary surety will be strictly construed, and doubts and technicalities resolved in surety's favor, contracts of companies acting as surety for compensation must be construed most strongly against the insurer and in favor of the indemnity. (*Post, p. 276.*)

Cases cited and approved: *Philadelphia, to Use, etc., v. Fidelity & Deposit of Maryland*, 231 Pa., 208; *American Surety Co. of New York v. Pangburn*, 182 Ind., 116; *Hormel & Co. v. American Bonding Co.*, 33 L. R. A. (N. S.), 513; *Railroad v. Fidelity & Guaranty Co.*, 125 Tenn., 658-690; *Hunter v. Guaranty Co.*, 129 Tenn., 572-581.

2. PRINCIPAL AND SURETY. Contracts. Failure of principal to sign bond.

Where the principal or obligor is bound by law or collateral undertaking so that the rights of surety are not jeopardized, the failure to sign the bond renders the same only technically, and not substantially, defective, and does not release the surety. (*Post, pp. 276, 277.*)

Cases cited and approved: *U. S. Fidelity & Guaranty Co. v. Haggart*, 163 Fed., 809.

Cambria Coal Co. v. Nat. Surety Co.

Case cited and distinguished: *Star Grocer Co. v. Bradford et al.*,
70 W. Va., 496.

3. PRINCIPAL AND SURETY. Surety bonds. Signature of principal.

Where a surety bond neither expressly nor by implication obligates the employee to perform any act, duty, or undertaking same affixing his signature, and his name appears thereon only as employee and his application for bonds binds him to insure surety against all loss, the employee's failure to sign the bond does not release the surety. (*Post*, pp. 277-280.)

Case cited and distinguished: *State, Use of Treasurer, v. Bowman*,
10 Ohio, 445.

FROM KNOX.

Appeal from the Chancery Court of Knox County.—
HUGH M. TATE, Chancellor.

FOWLER & FOWLER, for Cambria Coal Co.

CORNICK, FRANTZ, McCONNELL & SEYMOUR, for Nashville Surety Co.

MR. JUSTICE BACHMAN delivered the opinion of the Court.

By a guaranty bond, dated November 13, 1917, the National Surety Company of New York undertook to indemnify the Cambria Coal Mining Company of Briceville, Tenn., against any act of larceny or embezzlement on the part of one James N. Landrum, bookkeeper and store manager for the obligee company. The penalty of the bond was \$5,000, and the consideration for the undertaking was \$25. There was default by

Cambria Coal Co. v. Nat. Surety Co.

the employee, and on June 6, 1918, the complainant, Cambria Coal Mining Company, filed its bill in the chancery court of Knox county, seeking to recover on the bond executed by the defendant surety company the sum of \$3,935.84, alleged to have been taken from it by its guaranteed employee Landrum, by acts amounting to larceny or embezzlement. A copy of the bond was exhibited with the bill.

Thereupon the defendant demurred to the bill, alleging:

"I. The bond, exhibited with the bill as 'Exhibit A' contains a provision that it shall be void unless duly executed by the employee, the principal therein, James N. Landrum; said bond also shows upon its face that the said employee has failed to execute the same.

"II. The bill fails to show the alleged acts of larceny or embezzlement which forms the basis of the complainant's right of action. The defendant prays judgment upon said demurrer as to whether it shall be required to answer."

Subsequently, consent of the court having been obtained, the complainant filed an amended bill, wherein it alleged that prior to the making of the bond, and before undertaking its execution, the defendant surety company had required Landrum, the employee, to make to it an application containing the following provisions, as shown by a copy of the form of application attached to the amended bill:

"The undersigned hereby agrees that you may indemnify the employer hereinafter named in any amount the employer may desire in favor of Cambria Coal Company (employer) to such extent and in such form as

Cambria Coal Co. v. Nat. Surety Co.

may be agreed upon between you and the employer in respect of the acts of the undersigned in said employer's services as bookkeeper and store manager at Briceville, in the State of Tennessee, or in any other position in the employer's services to which the undersigned may be appointed. . . .

"For good and valuable consideration, the undersigned hereby agrees to indemnify and save harmless the said National Surety Company from and against any and all loss, damages, fees, or expense which it may incur or sustain by reason of having agreed to indemnify as hereinabove set forth against the acts or omissions of the undersigned in the positions mentioned and referred to, or in any other position that may be filled by him, and to make good and reimburse to the company all sums of money which it may pay or become liable to pay in consequence of any such agreement of indemnity. The undersigned also agrees that the company may at any or all times decline to assume indemnity in his behalf in any positions whatsoever, and may at any time terminate such indemnity assumed in his behalf in connection with any position whatsoever, and expressly releases the company from furnishing reasons for terminating its indemnity aforesaid, and from any and all claims, demands, damages, or causes of action that may accrue by reason of the failure of the company to furnish such reasons. The undersigned also agrees that the company or any present or former employer of the undersigned, or any other person, firms or corporation, may disclose and furnish any information which they may have obtained

Cambria Coal Co. v. Nat. Surety Co.

or may at any time obtain concerning the undersigned or his affairs, and the undersigned hereby expressly releases and discharges the company and each and all of the said employers, persons, firms or corporations from any and all claims, demands, damages, or causes of action arising by reason of the furnishing or disclosing of such information whether the same be true or not. The undersigned also hereby agrees that the vouchers or other proper evidence showing payment by the company of any claim, demand, loss, damages, fees, or expenses in connection with any such indemnity in his behalf shall be conclusive evidence of the fact and amount of liability in that respect of the undersigned to the company, provided that such payment shall have been made by the company in good faith, believing it was liable therefor."

The amended bill then alleged:

"After the defendant through its authorized agent received said application duly filled out and properly executed by the said James N. Landrum, it thereupon executed the bond herein sued upon, and delivered it to the complainant as a complete undertaking to protect the complainant against loss, which it might sustain by reason of the defalcations of said Landrum as therein specified; and said bond was accepted by complainant with the full understanding that it was being protected by the defendant against said misconduct of the insured, and as a consideration for such protection the complainant paid to the defendant \$25 premium as aforesaid."

Cambria Coal Co. v. Nat. Surety Co.

By consent, the demurrer theretofore filed to the original bill was treated as standing to the amended bill, and upon hearing by the chancellor the first ground of the demurrer was sustained, from which action an appeal was prayed, and the case is before us on such appeal.

An examination of the original bond, filed subsequently to the exhibition of the copy hereinbefore referred to discloses a several undertaking by the National Surety Company to indemnify the Cambria Coal Mining Company against acts of larceny or embezzlement by its employee James N. Landrum.

The eighth, of nine provisions in the bond recited to be conditions precedent to any recovery thereunder, provides:

“This bond shall be void, unless it be duly executed by the employee, and the premium charged, actually be paid to the surety or its duly authorized agent, within sixty (60) days after the same shall become due and payable.”

The bond is not signed by the employee and the question whether, upon the facts stated, there exists an enforceable undertaking on the part of the defendant surety company is here presented for the first time. The question has, however, frequently arisen in other states, and an examination of the authorities discloses many varying decisions, due largely to the varying contracts of suretyship presented for construction. While there is an apparent lack of harmony in the reported cases, there are found certain well-recognized principles applicable in the construction of such contracts.

Cambria Coal Co. v. Nat. Surety Co.

It is well settled that while the contract of an individual or voluntary surety is to be strictly construed and all doubts and technicalities are to be resolved in favor of the surety, such construction is not applicable to the contracts of companies organized for the purpose of acting as surety for compensation. In the cases of the latter the contract is to be most strongly construed against the surety and in favor of the indemnity which the obligee has reasonable grounds to expect; the rule of *strictissimi juris* does not apply. *Philadelphia, to Use, etc., v. Fidelity & Deposit of Maryland*, 231 Pa., 208, 80 Atl., 62, Ann. Cas., 1912B, 1086, note; *American Surety Co. of New York v. Pangburn*, 182 Ind., 116, 105 N. E., 769, Ann. Cas., 1916E, 1126; note to *Hormel & Co. v. American Bonding Co.*, 33 L. R. A. (N. S.), 513; *Railroad v. Fidelity & Guaranty Co.*, 125 Tenn., 658-690, 148 S. W., 671; *Hunter v. Guaranty Co.*, 129 Tenn., 572-581, 167 S. W., 692.

So also from the array of conflicting authorities, differing as they do in the conclusions reached, it is to be found that, where the principal or obligor is bound by law or a collateral undertaking so that the rights of the surety are not jeopardized, the failure to sign the bond renders the same only technically, and not substantially, defective and does not operate to release the surety from liability thereon. *U. S. Fidelity & Guaranty Co. v. Haggart*, 163 Fed., 809, 91 C. C. A., 289, Ann. Cas., 1917C, 1073, note; *Star Grocer Co. v. Bradford et al.*, 70 W. Va., 496, 74 S. E., 509, 39 L. R. A. (N. S.), 184. The reason for the rule is well expressed in *Star Grocer Co. v. Bradford*, supra:

Cambria Coal Co. v. Nat. Surety Co.

"The ground of their release, in case of the omission of a surety to sign, as contemplated by the parties, is the injury resulting to those who signed, in case they were bound, because of their inability to exact contribution from the omitted cosurety, since he is not bound at all. This result cannot be predicated of the omission of the principal to sign, when the law or another contract binds him as firmly and fully as the bond would have bound him, had he executed it, and for the benefit of the sureties under the law of subrogation, as well as that of the obligee. Every rule and exception is co-extensive only with the reason underlying it; and, as there is no substantial reason for discharge of the sureties under such circumstances, they should be held liable. The equitable remedies for subrogation and indemnity are as fully available and efficacious as if the principal had executed the bond. In no substantial sense, therefore, are the sureties affected by the omission."

The question of subrogation, or the rights of the surety to reimbursement by the principal, need not be considered in the instant case, the bill alleging and the copy of the application executed by the employee prior to the issuance of the bond clearly showing the contract between the principal and the surety, securing such rights to the surety.

The bond here in no wise, expressly or by implication, obligates the employee to the performance of any act, duty, or undertaking, save that of affixing his signature as provided in the eighth clause thereof. His name appears on the instruments only as the employee against whose default the surety proposes to indemnify

Cambria Coal Co. v. Nat. Surety Co.

the obligee. There is nothing he is bound to do; nothing he is called upon to refrain from doing. As the surety's principal, if from this bond he can be denominated as such, so far as the bond is concerned, he is only responsible to the law. It is otherwise as to the application for the bond executed by the employee as a precedent condition to the making of the bond by the surety company; there is to be found the obligation of the employee to his surety. In addition to his agreement to the indemnifying contract between the surety and his employer, after furnishing exhaustive data concerning his race, color, and antecedents, and his present moral, social, and financial *status*, he unreservedly binds himself to insure the surety against every loss, all and several.

A consideration of the bond, unsigned by the employee, together with the application therefor, duly executed, presents only one material inquiry: What change has been made in the *status* of the surety company by reason of the failure of the employee to sign the bond, what rights has it lost or what liability has it incurred by the omission? It may be urged, as has been in argument here, that the signature of the employee would authorize the obligee, the complainant here, to maintain a joint action against the employee and the surety, and a recovery against both would obviate the bringing of another suit by the surety against the employee. Answer to this is that in the present suit the defaulting employee would probably be a proper party defendant had the complainant desired to so proceed against him. Certainly, had the bond been signed by the employee, together with the surety, it

Cambria Coal Co. v. Nat. Surety Co.

would have been optional with the complainant to sue both jointly or either singly, and upon its election the surety could not complain. But, admitting the insistence a reasonable one, it is but a technical right of convenience in procedure; to maintain it for the benefit of the defendant results in the destruction of a substantial, fundamental right of the complainant. To this we are unwilling to accede.

To quote from *State, Use of Treasurer, v. Bowman*, 10 Ohio, 445:

"Great reliance is placed upon the fact that, if the instrument is not executed by the principal, it will affect the remedy over against him by the securities. There would be great force in this argument if the remedy were destroyed; but it is not; the force and the extent of this liability to them are unimpaired. Whether they could use the bond, *per se*, as evidence of his liability presents a question merely of convenience in the use of the right, but does not affect the right itself, any more than would the loss or destruction of the bond."

Where questions of convenience or facility of procedure oppose the presentation of rights as a matter of justice, the former must give way.

The bond herein was executed for the benefit of the complainant, delivered to it as the party to be indemnified, the consideration was paid, accepted, and is still retained by the surety company. Considering the bond in view of the principles heretofore stated, we deem it a valid and enforceable undertaking upon which the complainant is entitled to rely; the signature of the employee would in no wise augment the efficacy of the

Cambria Coal Co. v. Nat. Surety Co.

instrument, no rights, additional to or greater than those already belonging to the surety as against the employee, would have accrued to the surety by reason of its being placed thereon; no liabilities were incurred by the failure of the employee to sign. The right of the surety company to place in its contracts such conditions as it may deem advisable is not to be denied, but the reasonableness or materiality of such provisions are to be determined by the courts in adjudging the rights of the respective parties thereto.

In stating our conclusions, we are not unmindful of the conflict in the authorities on the question herein involved, nor of the contrary views expressed in cases to which we have referred in the excellent brief of counsel for the defendant. It is our decision that, on the facts of this case, the surety company is not relieved of liability by reason of the omission of the employee to sign the bond. It results that the action of the chancellor must be reversed, and the cause remanded.

The defendant will pay the costs of this appeal.

In re Walker.

Petition of WALKER. NEW RIVER LUMBER Co v. TENNESSEE Ry. Co. TENNESSEE Ry Co. v. STANDARD TRUST Co. *et al.*

(Knoxville. September Term, 1918.)

1. RAILROADS. Property. Liens. Constitutionality of statute.

Shannon's Code, section 1530, providing that no lien created by railroad on its property shall be valid against judgments for damages to persons and property in the operation of its railroad is valid. (*Post*, p. 284.)

Case cited and approved: *Frazier v. Railroad*, 88 Tenn., 138.

Code cited and construed: Sec. 3, ch. 72 (S. 1877).

2. RAILROADS. Property. Liens. Construction of statute.

Shannon's Code, section 1530, preventing railroad company from creating mortgage or lien to be valid as against specified claims, does not create a lien in favor of those coming within its provisions, but operates to postpone liens created by railroad company to the satisfaction of claims of the preferred class. (*Post*, p. 285.)

Case cited and approved: *Railroad v. Evans*, 66 Fed., 809.

3. RECEIVERS. Authority of court. Liens.

Court operating railroads under direction of receiver cannot create a priority of lien forbidden by the statutes. (*Post*, p. 285.)

4. RAILROADS. Receivers. Authority of court.

Generally court may order or authorize receiver to do any acts in regard to the preservation or operation of a railroad which are within the corporate powers of the company, but the receiver cannot exercise, nor can the court authorize him to exercise, any powers or franchises beyond those of the company to whose possession he succeeds. (*Post*, p. 285.)

In re Walker.

5. RECEIVERS. Judgment for personal injuries. Receiver's certificates. Priority.

Under Shannon's Code, section 1530, judgment recovered against receiver of railroad for death from negligence in operation of road held prior to receiver's certificates; the receiver standing in no more favored position as to priority of incumbrance against such judgment than the railroad. (*Post*, pp. 285-287.)

Cases cited and approved: *Anderson v. Condict*, 93 Fed., 349; *Tradesmen Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn., 634; *Smith v. Printing Co.*, 97 Tenn., 351; *Comfort v. McTeer*, 75 Tenn., 652; *Barnett v. E. T., V. & G. R. Co. (Ch.)*, 48 S. W., 817; *Hill v. Ry. Co. (Ch.)*, 42 S. W., 888.

FROM SCOTT.

Appeal from the Chancery Court of Scott County—
HUGH G. KYLE, Chancellor.

J. A. FOWLER and B. CECIL, for A. C. Walker, Adm'r.

H. M. CARR, for creditors' bill and receiver.

MR. JUSTICE BACHMAN delivered the opinion of the Court.

A statement of the facts of these cases, out of which the present controversy arises, is to be found in 136 Tenn., 661, 191 S. W., 334.

Subsequent to the appointment of the receiver and the issuance of receiver's certificates to the amount of \$310,000, the restraining order enjoining institution of suits against the receiver having been modified

In re Walker.

by the chancellor, the appellant herein, A. C. Walker, as the administrator of the estate of Roscoe Walker, deceased, alleging that the death of his intestate was caused by the negligence of the receiver's employees in the operation of the road, recovered a judgment in the circuit court against the receiver amounting, with interest and costs, to the sum of \$3,808.90.

On August 17, 1918, in response to the order of the court, the master filed his report, in which was shown, among others of like character, the judgment referred to, "and that the same should be paid out of any net earnings or income of said receiver in operating said railway."

The appellant, on August 20, 1918, filed exceptions to the report of the master as follows:

"A. C. Walker, administrator, excepts because the master did not report that the payment of all other claims except those secured by statutory lien should be postponed till after the payment of his judgment, in that said judgment was rendered in his favor for the death of his intestate, Roscoe Walker, caused by the negligence of the receiver's employees in the operation of the road of which he had charge."

This exception was overruled by the court.

In adjudging the order of priorities the court decreed the payment of claims as follows:

(1) All the unadjudged costs of the consolidated causes, including allowances to the receiver and counsel for the receiver and for the general creditors.

(2) The liabilities for taxes.

(3) The receiver's certificates, with interest or interest coupons thereon, and the claims of the Manufacturers' National Bank of Harriman, First National

In re Walker.

Bank of Rockwood, and the Mechanics' Bank & Trust Company, reported by the master under the head of "Liabilities by Notes."

(4) All other liabilities of the receiver as shown by the report filed August 17, 1918, and as confirmed by said decree.

The certificates authorized and issued by the receiver provide that the same "shall be and constitute a first lien on the property of the Tennessee Railway Company, and each certificate shall be and constitute an equal and joint lien with all other certificates of like nature and character without reference to the date of the negotiation of the same."

The question here presented is one of priority, under our statute, between a judgment creditor for damage done to persons and the receiver's certificates issued under the authority of the court.

Section 1530 of the Code (Shannon's Acts of 1877, chapter 72, section 3) provides that: "No railroad company shall have power to give or create any mortgage or other kind of lien on its railway property in this State which shall be valid and binding against judgments and decrees and executions therefrom for timbers furnished and work and labor done on, or for damages done to persons and property in the operation of, its railroad in this State."

The statute is a valid and constitutional limitation upon the power of all railroads in the State to create any lien valid as against claims of the character therein enumerated. *Frazier v. Railroad*, 88 Tenn., 138, 12 S.W., 537.

In re Walker.

The statute does not create a lien in favor of those coming within its provisions, but operates to postpone liens created by railroad companies to the satisfaction of claims of the preferred class. *Railroad v. Evans*, 66 Fed., 809, 14 C. C. A., 116.

It is clear that the railway company herein, had it been operating the road at the time of the injury complained of, could have created or incurred no obligation in any wise conflicting with the provisions of the statute.

Can the court, operating the railroad under direction of its receiver, create a priority forbidden by the statute? We think not.

"Generally speaking, the court may order or authorize the receiver to do any acts with regard to the preservation and operation of the road which are within the corporate powers of the company; but the receiver cannot exercise nor can the court authorize him to exercise any powers or franchises beyond those of the company to whose possession he succeeds." 33 Cyc., 627.

The receiver, in operating the railroad under direction of the court, stood, with respect to his duties and liabilities, in the same position as did the corporation had it been so engaged. Whether the receiver is to be regarded as the officer of the court or of the corporation, or of the creditors, or as the representative of all those interested, he is intrusted with the powers of the corporation, and is onerated with its charter and statutory responsibilities and obligations. So, if the Tennessee Railway Company, as owner or the Standard Trust Company, as mortgagee, were in possession and operating the railroad, there could arise no question of the application of the act of 1877; the receiver stands in

In re Walker.

no more favored position. *High on Receivers* (4th Ed.), section 395, and authorities cited.

Claims of the character presented herein are considered meritorious, have received the protection of our statutory enactment, and the liabilities incurred by the railroad itself or through the receiver should be postponed until after their satisfaction.

Independent of statute, it has been held, where certificates of a receiver of a railroad were declared a first lien on the property and its proceeds, and on all net income derived from its income after the payment of costs and expenses of administration, that a claim for personal injuries happening during the operation of the road by the receiver was an expense incurred in and by reason of the operation of the road, and should be charged upon the *corpus* of the property, where there was not sufficient income to pay the same. *Anderson v Condict*, 93 Fed., 349, 35 C. C. A., 335.

We deem inapplicable the cases of *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 32 S. W., 1097, 31 L. R. A., 593, 49 Am. St. Rep., 943, *Smith v. Printing Co.*, 97 Tenn., 351, 37 S. W., 10, and *Comfort v. McTeer*, 7 Lea, 652, cited in support of the contention of the priority of the receiver's certificates. These cases hold that upon an overt act of insolvency by a corporation its assets constitute a fixed trust fund for the benefit of all creditors, and preferences sought to be made are invalid. The statute under consideration in no wise applies to such cases. In the case here preferences are created by virtue of the statute.

In *Barnett v. E. T., V. & G. Ry. Co.* (Ch.), 48 S. W., 817, in so far as there was a consideration of the act

In re Walker.

of 1877, it was decided that, approving *Hill v. Ry Co.* (Ch.), 42 S. W., 888, a creditor by judgment for personal injuries was not entitled to relief or satisfaction of his claim where there had been a valid sale of all the railroad properties, and the creditor had not taken advantage of ample opportunity to present and have allowed his claim. The court there decided that in a general creditors' proceeding wherein the debtor railroad was wound up as an insolvent corporation, its property sold, and the proceeds distributed among its creditors, a creditor given preference by the act of 1877, with notice of the insolvency proceedings, could not follow the property into the hands of the purchaser, *Railroad v. Evans*, supra.

Such is not this case. Here the creditor intervenes, and claims his preferential right to which we hold him entitled. The decree of the chancellor will be accordingly modified.

Warehouse & Cold Storage Co. v. Anderson.

CHATTANOOGA WAREHOUSE & COLD STORAGE CO v. HATTIE A. ANDERSON.*

(Knoxville. September Term, 1918.)

1. NEGLIGENCE. Duty to invitee.

Owner, who expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, has duty of being reasonably sure that he is not inviting them into danger, and to that end must exercise ordinary care and prudence to render the premises reasonably safe for the visit. (Post, pp. 293, 294.)

Case cited and distinguished: Bennett v. L. & N. Railroad Co., 102 U. S., 577.

2. NEGLIGENCE. Duty to invitee. Condition of premises.

Duty of owner to keep premises in reasonably safe condition for those impliedly invited thereon extends only to those parts of the premises where person invited is expected to go. (Post, pp. 294-296.)

Cases cited and approved: Bedell v. Berkey, 76 Mich., 439; Murray v. McLean, 57 Ill., 378; Bennett v. Butterfield, 112 Mich., 96; Lehman v. Coffee, 146 Wis., 218; Menteer v. Fruit Co., 240 Mo., 177; Schmidt v. Bauer, 80 Cal., 568; Parker v. Publishing Co., 69 Me., 179; Pierce v. Whitcomb, 48 Vt., 129; McCarvell v. Sawyer, 173 Mass., 540; Cowen v. Kirby, 180 Mass., 505; Phillips v. Library Co., 55 N. J. Law, 307; Ryerson v. Bathgate, 67 N. J. Law, 337; Shaw v. Goldman, 116 Mo. App., 332; Ferguson & Palmer Co. v. Ferguson (Ky.), 114 S. W., 297; Zoebish v. Tarbell, 10 Allen (Mass.), 385; Stamford Oil Mill Co. v. Barnes, 103 Tex., 409; New York Lubricating Oil Co. v. Pusey, 211 Fed., 625.

Cases cited and disapproved: Indameur v. Dames, 19 Eng. Rul. Cas., 64; Pauckner v. Wakem, 231 Ill., 277; Glaser v. Rothschild, 221 Mo., 186; Pelton v. Schmidt, 104 Mich., 345.

*For authorities on the question as to whether one who goes upon property on business with the owner is deprived of the right to protection against defects by the fact that he temporarily turns aside to pursue a purpose of his own, see note in 14 L. R. A. (N. S.), 1119.

Warehouse & Cold Storage Co. v. Anderson.

3. NEGLIGENCE. Unguarded elevator shaft. Liability of owner for injuries.

Storage company, having adjoining building being constructed by contractor, owed concrete inspector, employed in the construction of adjoining building, no duty of keeping its wareroom in reasonably safe condition, though inspector frequently consulted with president of storage company, and occasionally transacted business with him in the office of the storage company, where he had never been invited into, and had no business to transact in, the wareroom. (*Post*, p. 296.)

4. NEGLIGENCE. Theory of.

The theory of all negligence cases is that the defendant has violated some legal duty he owed plaintiff. (*Post*, p. 296.)

Case cited and distinguished: Williams v. Nashville, 106 Tenn., 538.

FROM HAMILTON.

Appeal from the Circuit Court of Hamilton County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—Hon. NATHAN L. BACHMAN, Judge.

STRANG & FLETCHER, WILLIAMS & LANCASTER and BROWN, SPUBLOCK & BROWN, for appellant.

TATUM, THACH & LYNCH and COGSWELL & FLETCHER, for administratrix.

MR. JUSTICE MCKINNEY delivered the opinion of the Court.

A. S. Anderson, the husband of the defendant in error, on October 23, 1916, fell through an open eleva-

Warehouse & Cold Storage Co. v. Anderson.

tor shaft, located in the building occupied by the plaintiff in error, in Chattanooga, and received injuries, from which he died in a few hours.

Suit was instituted to recover damages therefor, and a verdict of \$20,000 was rendered by the jury, upon which judgment was entered, after a motion for a new trial had been overruled by the court.

Upon appeal this judgment was reversed by the court of civil appeals, and the suit was dismissed; motions for peremptory instructions having been made in the lower court. The case has been brought to this court by writ of *certiorari*.

The plaintiff in error operated a warehouse and cold storage plant in Chattanooga in a building owned by the Stone Fort Land Company. Mr. Theodore King was president and general manager of the storage company. This building extended one hundred feet from east to west, eighty feet from north to south, and was six stories in height. The south fronted on the street, and had a platform on a level with the first floor. There was a large door on the south side, about the middle of the building, and goods received by wagon or truck, for storage, were unloaded on this platform and conveyed into the building through this large door.

The office was located in the southwest corner of the building, on the first floor, and was partitioned off from the wareroom proper. There was a door leading from the office into the wareroom, a door leading from the platform into the office, and steps leading from the street up to the platform, about opposite the office door.

The business of the storage company had grown to such proportions that the building occupied by it was

Warehouse & Cold Storage Co. v. Anderson.

insufficient to take care of its business, so that, on September 20, 1916, it entered into a contract with the Stone Fort Land Company, by which the latter was to erect a building east of and adjoining the old building, and lease same to the storage company for a term of years. The new building was to be one hundred by one hundred eighty feet, to be four stories high, and was to be constructed of reinforced concrete. The plans and specifications for the new building were agreed upon and made a part of the contract between the storage company and the land company. The contract for the erection of the new building was let by the land company to T. S. Moudy & Co. Mr. McDavity was the superintendent in charge of the construction, W. C. Spiker was the inspector of the concrete work, and said A. S. Anderson was the inspector under Mr. Spiker. W. T. Downing, the architect, had general supervision of the entire work. None of these parties were in the employ of the storage company, and this latter company had nothing to do with the erection of the new building, the supervision of the work, or the workmen, and was not to be consulted about anything connected therewith.

Mr. King, the president and general manager of the storage company, was frequently about the new building discussing it with the workmen, and he says that his purpose in this was to see that a good building was erected in accordance with the specifications, since he was to occupy the building.

Mr. Anderson was on the work from ten to fifteen days before he was killed. During that time he had frequent conversations with Mr. King, where the new

Warehouse & Cold Storage Co. v. Anderson.

building was being erected, several times in the office of the old building, and he and Mr. King were seen in the office several times engaged in conversation with blueprints before them.

Mr. King testifies that, according to his recollection, they never discussed the plans or the construction of the new building in the office, but that on several occasions some one did call Mr. Anderson over his telephone, and that he would send for Mr. Anderson, who would come to the office and talk over the telephone.

So far as the record shows, Mr. Anderson, prior to the day of the injury, had never been in any part of the storage company's building, except the office.

Mr. King testifies, without contradiction, that all business with the storage company was transacted in the office; that no one, except the employees, was permitted to enter the wareroom, with the further exception that customers having goods stored there were permitted to inspect same, when accompanied by some employee of the company; that he had never invited Mr. Anderson into the wareroom, and that he had never seen him in any part of the building other than the office.

About 4:30 or 5 o'clock on the afternoon of the accident Mr. Anderson and Mr. King were engaged in a conversation about the middle of the new building. Mr. King returned to the old plant. There is a dispute as to whether he was in the office or in the wareroom, when Mr. Anderson came to the old building some twenty or thirty minutes later. Mr. Anderson spoke to one Lowe, an employee of the Hamilton Produce Company, who was unloading some barrels of cabbage at the large

Warehouse & Cold Storage Co. v. Anderson.

door on the south side, and asked if he knew where Mr. King was, to which Lowe replied that he thought Mr. King was in the back end of the wareroom. There is nothing in the record to show the purpose for which Mr. Anderson wanted to see Mr. King. However, it has been assumed by counsel that he wanted to see him about the construction of the new building. The elevator shaft was about twenty-five feet from this large door, and some ten or twelve feet from the door leading from the office into the wareroom. Lowe did not notice whether Mr. Anderson entered through the large door directly into the wareroom, or entered the wareroom through the office. In a few moments a cry for help was heard, and it was discovered that Mr. Anderson had fallen through the elevator shaft to the basement. The elevator shaft was unguarded and the wareroom was dark.

Under this state of facts, is the storage company liable for the injury suffered by Mr. Anderson resulting in his death?

The general rule is succinctly, but accurately, stated by Mr. Cooley in his work on Torts (page 604, 607), and approved by the supreme court of the United States in *Bennett v. L. & N. Railroad Co.*, 102 U. S., 577, 26 L. Ed., 236, as follows:

“When one expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit.”

Warehouse & Cold Storage Co. v. Anderson.

It is not insisted that Mr. Anderson was on the premises by express invitation; it therefore becomes necessary to determine whether he was there by implied invitation.

Implied invitation is thus defined by Shearman & Redfield on Negligence (6th Ed.), section 706:

"Invitation by the owner or occupant is implied by law, where the person going on the premises does so in the interest or for the benefit, real or supposed, of such owner or occupant, or in the matter of mutual interest, or in the usual course of business, or where the person injured is present in the performance of duty, official or otherwise."

The great weight of authority, however, qualifies this definition of implied invitation by providing that where one goes upon the premises of another, for any of the purposes stated above, he must confine himself to such parts of the premises as are included in the invitation. Such implied invitation does not involve in its scope such parts of the establishment to which the public is not invited. It is only those parts of the premises where the person invited is expected to be that the owner is required to keep in a reasonably safe condition.

As stated by one writer, operators of factories and mills do not impliedly invite customers into parts of their plants where the machinery is being operated, hotel keepers do not invite guests to their engine rooms, and carriers do not invite passengers to the many places not fitted up for their use. The foregoing conclusion is supported by the following authorities: *Bedell v. Berkey*, 76 Mich., 439, 43 N. W., 308, 15 Am. St. Rep., 370; *Murray v. McLean*, 57 Ill., 378; *Bennett v. Butter-*

Warehouse & Cold Storage Co. v. Anderson.

field, 112 Mich., 96, 70 N. W., 410; *Lehman v. Coffee*, 146 Wis., 218, 131 N. W., 362; *Menteer v. Fruit Co.*, 240 Mo., 177, 144 S. W., 833; *Schmidt v. Bauer*, 80 Cal., 568, 22 Pac., 256, 5 L. R. A., 580; *Parker v. Publishing Co.*, 69 Me., 179, 31 Am. Rep., 262; *Pierce v. Whitcomb*, 48 Vt., 129, 21 Am. Rep., 120; *McCarvell v. Sawyer*, 173 Mass., 540, 54 N. E., 259, 73 Am. St. Rep., 318; *Cowen v. Kirby*, 180 Mass., 505, 62 N. E., 968; *Phillips v. Library Co.*, 55 N. J. Law, 307, 27 Atl., 478; *Ryerson v. Bathgate*, 67 N. J. Law., 337, 51 Atl., 708, 57 L. R. A., 307; *Shaw v. Goldman*, 116 Mo. App., 332, 92 S. W., 165; *Ferguson & Palmer Co. v. Ferguson* (Ky.), 114 S. W., 297; *Zoebish v. Tarbell*, 10 Allen (Mass.), 385, 87 Am. Dec., 660; *Stanford Oil Mill Co. v. Barnes*, 103 Tex., 409, 128 S. W., 375, 31 L. R. A. (N. S.), 1218, Ann. Cas., 1913A, 114; *New York Lubricating Oil Co. v. Pusey*, 211 Fed., 625, 129 C. C. A., 88; *Thompson on Negligence*, sections 988, 990.

The defendant in error relies on the following cases as holding to the contrary, to wit: *Indameur v. Dames*, 19 Eng. Rul. Cas., 64; *Pauckner v. Wakem*, 231 Ill., 277, 88 N. E., 202, 14 L. R. A. (N. S.), 1118; *Glaser v. Rothschild*, 221 Mo., 186, 120 S. W., 1, 22 L. R. A. (N. S.), 1045, 17 Ann. Cas., 576; *Pelton v. Schmidt*, 104 Mich., 345, 62 N. W., 552, 53 Am. St. Rep., 462.

These latter cases can be distinguished from those cited above; but, even if they are in conflict, we think the former carry the decided weight and announced the more reasonable and just rule.

Conceding that Mr. Anderson was seeking Mr. King on business, and that he transacted business with him before in the office of the storage company, there is noth-

Warehouse & Cold Storage Co. v. Anderson.

ing in the record to even suggest that he was ever invited into the wareroom, or that it was even suspected by the company that he would come into that private room, a place not open to the public, dark, unlighted, a part of the establishment he had never entered before.

We are unable to see upon what theory it could be held that the storage company was obligated or owed any duty to Mr. Anderson to keep its wareroom in a safe condition.

The theory of negligence was well stated by this court in *Williams v. Nashville*, 106 Tenn., 538, 63 S. W., 233, the court saying:

"For the theory of all negligence cases is that the defendant has violated some legal duty he owed plaintiff. So where such duty does not exist, however unfortunate the injury may be, and free from negligence, yet he must alone bear the consequences; he cannot impose them upon one under no obligation in law towards him, save not to inflict, directly or indirectly, wanton injury upon him."

We think that the court of civil appeals was correct in holding that Mr. Anderson entered the wareroom of the storage company without invitation, either express or implied, and that the storage company owed him no duty to keep said place safe.

It results that the judgment of the court of civil appeals is in all things affirmed.

Hutchins v. Wilson.

J. S. HUTCHINS et al. v. R. B. WILSON et al.

(*Knoxville*. September Term, 1918.)

1. COURTS. Appellate jurisdiction. Tennessee.

Where the principal purpose of a bill is a recovery of a money judgment in excess of \$1,000, an appeal will lie direct to the supreme court; but, if it have some other principal purpose, an appeal will lie only to the court of appeals, notwithstanding an incidental prayer for recovery of a money judgment in excess of \$1,000. (*Post*, p. 301.)

Case cited and approved: *Morris v. Railroad*, 124 Tenn., 524.

Cases cited and distinguished: *Singer v. Singer*, 122 Tenn., 671; *Railroad v. Byrne*, 119 Tenn., 278.

2. COURTS. Appellate jurisdiction. Tennessee. Appeal from decree upon creditors' bill.

The main purpose of a creditors' suit is not to obtain a money judgment, but to impound property, enjoin the proceedings in which property has been attached, and adjudicate the interests of all claimants as to their priority rights, and appoint a receiver for preservation of property, and the appellate jurisdiction thereof lies in the court of civil appeals. (*Post*, pp. 301-303.)

3. COURTS. Jurisdiction. Tennessee. Statutes.

Acts 1907, chapter 82, creating the court of civil appeals, confers upon it appellate jurisdiction in all civil cases from the law and equity courts, with certain named exceptions, and the supreme court cannot assert jurisdiction unless a particular case falls clearly within one of the exceptions enumerated. (*Post*, pp. 303, 304.)

Acts cited and construed: Acts 1907, ch. 82.

Case cited and distinguished: *Burns v. City of Nashville*, 132 Tenn., 434.

Hutchins v. Wilson.

FROM POLK.

Appeal from the Chancery Court of Polk County.—
Hon. Foss H. MERCER, Chancellor.

J. C. RAMSEY and MAYFIELD & MAYFIELD, for appellant.

J. HARRY SWAN, B. B. C. WITT and THOMPSON &
WILLIAMS, for appellees.

MR. JUSTICE McKINNEY delivered the opinion of the
Court.

This is a general creditor's suit. The bill was filed on behalf of the complainants and all other creditors of the defendant R. B. Wilson.

The total indebtedness claimed by the complainants against the defendant Wilson amounted to about \$500. The bill charged that said defendant was largely indebted to other parties, stating names and amounts, and that several of said creditors had instituted attachment and injunction suits.

It appears that, subsequent to the creation of these debts, the defendant had filed a voluntary petition in bankruptcy and had been discharged; that after such discharge the father of the defendant, R. B. Wilson, died, and by his will devised a valuable farm to the defendant R. B. Wilson, subject to the life estate in the mother of said defendant, who is a very old woman.

The defendant and his mother sold this farm for \$11,000; \$3,500 was for cash, and deferred notes were executed for the balance. After the delivery of the

Hutchins v. Wilson.

deed, but before the money and all of the notes were turned over to the vendors, these various creditors, claiming that the defendant, R. B. Wilson had repeatedly promised to pay their debts after he was discharged in bankruptcy, began filing injunction and attachment suits for the purpose of impounding said property and having it applied to their respective debts. Under this general creditors' bill an order was made, enjoining the further prosecution of these independent suits, and all creditors were required to prosecute their claims in this suit, which they did.

Only two of the creditors had claims amounting to as much as \$1,000.

This bill prayed for an attachment, injunction, the appointment of a receiver (which was granted), an accounting with the trustee, through whose hands the money and notes were to pass, a reference to ascertain the amount of the assets of the defendant, the names of the preferred creditors and amounts due them, the priority of liens, the names of the general creditors and the amounts due them, the costs and expenses of the suit, including compensation for the receiver and that of the solicitors, the interest of the mother of the defendant R. B. Wilson in the proceeds derived from the land, etc.

The master made a very full and elaborate report, to which exceptions were filed by the various parties, and these matters were all passed upon by the chancellor, and from his decree certain creditors, whose claims were disallowed, have appealed, and the defendant R. B. Wilson has appealed as to the claims allowed. Said appeals were prayed and allowed to this court.

Hutchins v. Wilson.

We are of the opinion that this court is without jurisdiction, and that the appeals should have been taken to the court of civil appeals.

But for the fact that two of the claims exceed \$1,000 the case of *Singer v. Singer*, 122 Tenn., 671, 126 S. W., 1085, would be conclusive. In that case it was held:

"Where each of several claimants sue individually in an administration suit in chancery for separate sums less than one thousand dollars, but the aggregate of which exceeds that amount, the court of civil appeals, and not the supreme court, has appellate jurisdiction, although their separate petitions, for convenience and to save expense, were consolidated and heard together in the chancery court."

Most of the authorities cited in the *Singer Case* were decisions involving the jurisdiction of the supreme court of the United States, and it was held in those cases that it did not have jurisdiction as to claims under \$5,000, even though some of the claims involved in the case exceeded \$5,000. It is not very clear that jurisdiction was exercised in those cases where some of the claims exceeded the jurisdictional amount, but, assuming that they did, if such holding were applied to a case like the one here involved, the result would be that as to two of these claims the appeal would lie to this court, while as to most of the claims the appeal would go to the court of civil appeals, although it is apparent that it is almost necessary that all of these matters be heard together; and, for reasons hereinafter stated, if any doubt exists as to which court has jurisdiction, the doubt should be resolved in favor of the court of civil appeals.

Hutchins v. Wilson.

But we have a different question involved here from that with which the supreme court of the United States was dealing in the cases cited in *Singer v. Singer*, supra.

In *Railroad v. Byrne*, 119 Tenn., 278, 104 S. W., 460, the court held:

Primary jurisdiction of the court of civil appeals is defined to embrace all cases brought up from courts of equity and chancery courts, except cases seeking money recoveries for more than \$1,000, and except cases involving the constitutionality of statutes, election contests, and State revenue and ejectment suits, and to embrace all cases brought up from the circuit and common-law courts, except cases involving the constitutionality of statutes, election contests, State revenue and ejectment suits.

If, therefore, the principal end, or purpose, of the bill was a recovery of a money judgment, then the appeal would lie direct to this court.

In *Morris v. Railroad*, 124 Tenn., 524, 137 S. W., 759, and other cases, it was held that an incidental prayer for the recovery of a money judgment, in excess of \$1,000, will not confer appellate jurisdiction upon this court, when the main purpose of the suit is to obtain some relief other than a money judgment.

It becomes important, therefore, to determine the purpose and object of a creditors' bill.

A creditors' bill is thus defined in 12 Cyc., 5.

"A creditors' bill has been defined to be a bill by which a creditor seeks to satisfy his debt out of some equitable estate of the debtor which is not liable to levy and sale under execution at law, or out of some prop-

Hutchins v. Wilson.

erty which has been put beyond the reach of the ordinary process."

And in notes to the above text we find the following definitions, which are supported by authority:

"A bill for the discovery of assets, debts owing by third persons and the like."

"A bill filed for an account of decedent's assets and a settlement of the estate or a bill filed against a fraudulent conveyance."

"A proceeding to enforce the security of a judgment creditor against the property and interest of his debtor."

"In their most comprehensive sense they are bills in equity by creditors to enforce payment of debts out of the property of debtors, under circumstances which impede or render impossible the collection of the debts by the ordinary process of execution."

"The jurisdiction over a creditors' bill is only exercised when the remedy afforded at law is ineffectual to reach the debtor's property, or when the enforcement of the legal remedy is obstructed by some incumbrance or by a transfer which has been made to defeat the creditors' rights."

From the foregoing authorities, as well as upon reason, it seems that the main purpose of this suit is not to obtain a money judgment, but to impound property, enjoin the proceedings in which the property has been attached, adjudicate the interest of all claimants in the property as to their rights of priority, and appoint a receiver for its preservation. The fixing of the amount due creditors is but one of the incidents of the suit, and cannot be said to be the principal one. It

Hutchins v. Wilson.

often happens that the claims of debtors have already been reduced to judgments, in which event the filing of such a bill as this could not be said to be primarily for the purpose of procuring a money judgment, but the principal purpose in such case would be to reach the property before it was dissipated, or made way with, or absorbed by other creditors.

This case is somewhat analogous to a bill filed by a judgment creditor on a *nulla bona* return. In such a case the creditor asks for a money decree, and that the property impounded be applied in satisfaction of such decree, but it is obvious that the prayer for the money judgment is not the primary purpose of the bill, for the creditor already has a money judgment; the main purpose of the bill is to reach trust property. As previously stated, where there is doubt as to the primary object of the bill, the jurisdiction should be held to be in the court of civil appeals.

In *Burns v. City of Nashville*, 132 Tenn., 434, 178 S.W., 1054, the court said:

"As stated before, it is difficult to determine what is the paramount object of the litigation. All the matters are of great importance, and it is hard to say that any one could be treated as incidental.

Chapter 82 of the Acts of 1907, creating the court of civil appeals, confers upon that court appellate jurisdiction of all civil cases coming up from the law and equity courts of this State, with certain exceptions named; that is to say, the act gives the court of civil appeals immediate supervision of all civil litigation in the lower courts, unless such litigation is of the particular character excepted by the act.

Hutchins v. Wilson.

"Where a general rule has been established by statute, with exceptions, the court will not curtail the former nor add to the latter by implication. Exceptions strengthen the force of a general law, and enumerations weaken it as to things not expressed.' Sutherland on Statutory Construction, section 328.

"Applying this rule of construction, inasmuch as general jurisdiction of civil appeals lies in the court of civil appeals, and the jurisdiction of this court exists only in exceptional cases, it follows that this court cannot assert jurisdiction, unless a particular case falls clearly within one of the exceptions enumerated; that is to say, unless we plainly see that we have jurisdiction of a particular case, we must conclude that the matter is one for the supervision of the court of civil appeals."

It results, therefore, that this case will be transferred to the court of civil appeals.

Moffat v. Schenck.

MARY A. MOFFATT *et al.* v. CHARLES R. SCHENCK *et al.**

(Knoxville. September Term, 1918.)

1. ADVERSE POSSESSION. Color of title. Void tax deed.

A tax deed under which defendants claimed the land in suit, even if void, constituted color of title in them. (*Post*, pp. 312, 313.)

Case cited and approved: Iron Co. v. Schwoon, 124 Tenn., 176.

2. LIMITATION OF ACTIONS. Removal of disabilities of married women. Effect on saving clause of disability statute.

Acts 1913, chapter 26, removing disabilities of married women, did not repeal saving clause of Shannon's Code, section 4448, in favor of married women, as to commencement of actions after removal of their disability, and complainant married woman had the right to sue the adverse possessors of land, under the saving clause of section 4448, within three years after chapter 26 took effect, January 1, 1914, and, not having done so, the suit, not filed until May 24, 1917, is barred. (*Post*, pp. 314-316.)

Acts cited and construed: Acts 1913, ch. 26; Acts 1901, ch. 15.

Case cited and approved: Jones et al. v. Coal Creek Mining & Mfg. Co., 133 Tenn., 160.

Code cited and construed: Sec. 4448(S.).

3. HUSBAND AND WIFE. Removal of disabilities of married women. Application of statute.

Acts 1913, chapter 26, removing the disabilities of married women and giving them the right to bind themselves personally, to sue and to be sued, etc., does not apply only to property, real and personal, in the possession of such women. (*Post*, pp. 316, 317.)

Case cited and approved: McIrvin v. Lincoln Memorial University, 138 Tenn., 260.

*On the question of statutory removal of disability of coverture as repealing exception in statute of limitations in favor of married women, see note in L. R. A., 1918C, 193.

Moffat v. Schenck.

FROM CUMBERLAND.

Appeal from the Chancery Court of Cumberland County.—Hon. F. T. FANCHER, Special Chancellor.

J. A. MONROE, for appellants.

WARD R. CASE, for appellees.

MR. JUSTICE HALL delivered the opinion of the Court.

The bill in this cause was filed by complainants in the chancery court of Cumberland county on May 24, 1917, seeking to recover of the defendants the title and possession of a certain tract of land known as Fentress County Entry 456, on which grant No. 5243 was issued to John B. McCormack on May 25, 1837.

Complainants claim title to said land through the original grantee, John B. McCormack, they being the heirs at law and next of kin of Mary H. Blake, to whom the said McCormack conveyed said land by deed bearing date of February 17, 1838, and which was recorded in the register's office of Fentress county on April 3, 1838. Mary H. Blake died August 11, 1885.

The defendants claim title to said land through Charles C. Schenck, father of the defendant Charles R. Schenck, who purchased said land at a tax sale had under a judgment rendered in the circuit court of Fentress county on August 24, 1882. By this judgment title was divested out of Mary H. Blake and vested in

Moffat v. Schenck.

Charles C. Schenck, who was put in actual possession of the land on September 13, 1882, by the sheriff of Fentress county under a writ of possession issued upon said judgment.

Defendants insist that said judgment gave them at least color of title. They also assert title under a tax deed based upon said sale executed on August 8, 1884.

It is contended by complainants that this tax sale and deed are void, and did not constitute color of title in the defendants. It is claimed by defendants that they have been in open, notorious, continuous adverse possession of said land from the date they were put in possession under said tax sale judgment to the date of the filing of the bill in this cause, and they rely upon such adverse possession to perfect their title to said land.

It is insisted by complainants that this alleged continuous adverse possession on the part of the defendants under said tax title has been broken by the following interruptions, and was not therefore continuous and exclusive, and cannot be counted for the time said interruptions existed.

First. That in December, 1885, J. S. Watson, who claimed to be the owner of grant No. 11741, which is a younger grant than that issued to John B. McCormack for the land in controversy, and which interlaps with and covers the western portion of the land embraced in grant No. 5243, brought an ejectment suit in the circuit court of Fentress county against S. S. Perkins and Anderson Ashburn, defendants' tenants, to recover that portion covered by the interlap of the Watson grant. It appears that Watson was successful in this

Moffat v. Schenck.

suit, final decree having been entered December 7, 1894, and a writ of possession issued in favor of Watson and against Perkins and Ashburn under said decree, but its execution was enjoined by Schenck and his associates by a bill filed in the chancery court at Jamestown on February 27, 1895. Schenck and his associates, who were the landlords of Perkins and Ashburn, were not made parties to the suit of *Watson v. Perkins and Ashburn*.

It appears that the suit of Schenck and others against Watson to enjoin the execution of the writ of possession issued in favor of Watson and against Perkins and Ashburn resulted in a decree for the complainants, and Watson was never put in possession of said land.

It is insisted by the complainants that the decree rendered in the cause of *Watson v. Perkins and Ashburn* had the effect of breaking the continuity of defendants' possession, notwithstanding Watson never was in possession, but only obtained a decree against the tenants of Schenck and his associates adjudging that he was entitled to possession.

Second. It is insisted that the defendants' possession was again broken on January 1, 1890, when Charles C. Schenck leased the land to one W. H. Neely, who, it appears, without the knowledge of Schenck, and while the land was occupied by Schenck's tenant, had previously, on November 13, 1899, taken a lease from J. S. Watson for the land covered by the Watson grant No. 11741. It appears that Watson has no actual possession of said land, and that Neely did not go into possession of it himself, but subleased it to one Jerre Hall, telling Hall that he was acting for Watson. About the time

Moffat v. Schenck.

Hall went into actual possession he went to Schenck and procured a lease from him, and thereafter held possession under the Schenck lease instead of the Watson lease. Watson, learning that Hall was holding under Schenck, procured Neely to bring an action of forcible entry and detainer against Hall. This suit was first tried before a justice of the peace on January 8, 1891, and resulted in a judgment in favor of Neely, from which Hall appealed. Neely gave bond for rents, and, under the statute, a writ of possession issued, and Hall was dispossessed, and one Bill Padgett was placed in possession of the land by Neely and Watson. In the circuit court there was a judgment in favor of Hall, and Neely appealed to the supreme court, where, on March 12, 1892, the judgment in favor of Hall was affirmed, and he was restored to possession as Schenck's tenant soon thereafter.

Third. That in 1891, while the suit of *Neely v. Hall* was pending, and while Schenck was in fact out of possession of said land, one William Mitchell appeared and claimed to be the only heir at law of Mary H. Blake. Schenck and his associates, believing that Mitchell was the only heir at law of Mary H. Blake, compromised his claim with him by conveying to him one-fourth of the land in controversy and retaining three-fourths. Thereafter, on June 26, 1891, said Mitchell gave Charles C. Schenck a power of attorney, in which Schenck was authorized to take possession of said land for him and in his name, and to bring suits to recover the same, if necessary, to establish and make good his title to said land, and thereafter dispose of the same in accordance with the terms of a joint agreement entered into con-

Moffat v. Schenck.

temporaneously with the execution of said power of attorney between the said Mitchell and Schenck. Thereafter, on April 5, 1893, said Mitchell conveyed his interest in said land to the defendant Charles R. Schenck. This deed contains the following recital:

"Transfer and convey unto Charles R. Schenck . . . all my right, title and interest . . . grant No. 5243 . . . sold by said John B. McCormack to Mary H. Blake, who was afterwards Mary Mitchell, and of whom I am the sole surviving heir."

It is insisted by complainants that the taking of this power of attorney by Schenck from Mitchell had the effect of surrendering and abandoning all previous possession of said land by Schenck in favor of Mitchell, and that, therefore, the period of adverse possession by Schenck prior to the date of the power of attorney cannot be counted in defendants' favor.

Fourth. That in 1895 or 1896 the Union Land Coal & Coke Company and the Tennessee Union Land Development Company held four separate and distinct one-acre possessions and inclosures on said land, which were cleared about the year 1895 or 1896, and were kept up and cultivated continuously each year until August 1, 1899, on which date said companies executed a deed to the defendants Charles R. Schenck and A. B. Bradford, conveying to them the land in controversy. It is insisted by complainants that these possessions held by the Union Land Coal & Coke Company and the Tennessee Union Land Development Company had the effect of impounding and neutralizing the defendants' possession of said land.

Moffat v. Schenck.

On the trial of the cause the complainants, who are married women, were allowed to amend their bill and plead and rely on their disabilities of coverture, but their husbands were not made parties complainants, and the cause proceeded to trial as to said married women in their own right.

It is insisted by the complainants that, by reason of the interruptions hereinbefore mentioned, the defendants had no valid adverse possession of said land until after the disabilities of said married women occurred, and that the defendants' plea of the statute of limitations cannot avail them; that the said Mary H. Blake, complainants' ancestor, died on August 11, 1885, on which date said land descended to her heirs at law, and those being under disability of coverture are as follows:

Complainant Anna H. B. Howe, owner of an undivided one-third interest, and the wife of William Read Howe, has been under continuous disability of coverture since the death of her father, John L. Blake, on October 10, 1899; that the complainant Elizabeth M. Mason was married in 1865; Julia C. Averill was married in 1886, and Mary A. Moffat was married in 1891, since which time they have all been under the disability of coverture, and jointly owning an undivided one-sixth interest in said land; that Mary L. Block, daughter of Louise R. Tyler, and granddaughter of the said Mary H. Blake, was married to John W. Block in the year 1879, and has been under disability of coverture since that date, and is entitled to an undivided one-twelfth interest in said land.

The cause was heard before special chancellor, F. T. Fancher, on June 20, 1918, who held that the defendants

Moffat v. Schenck.

had had more than seven years' continuous, peaceable, adverse, open, and exclusive possession of said land next preceding the filing of the bill, and that complainants' right of action was barred for the reason that they did not bring their suit within three years from January 1, 1914, on which date chapter 26 of the Acts of 1913 went into effect, and their bill was therefore dismissed. From the decree of the chancellor dismissing their bill complainants have appealed to this court, and have assigned errors.

Owing to our view of the cause, which is the same as that taken by the chancellor, it will not be necessary to determine whether the interruptions occurring in the defendants' possession prior to 1899 had the effect of breaking the continuity of such possession. The tax deed under which the defendants claim, even if void, would constitute color of title in them. *Iron Co. v. Schwoon*, 124 Tenn., 176, 135 S. W., 785.

The undisputed evidence shows that, since the execution of the deed by the Union Land Coal & Coke Company and the Tennessee Union Land Development Company, to defendants, on August 1, 1899, they have had continuous, open, exclusive, and uninterrupted possession of said land down to the present time. The possessions that were on said land at the date of the execution of said deed by the Union Land Coal & Coke Company and the Tennessee Union Land Development Company have been extended by the defendants and new possessions and new inclosures have been erected on said land by them. There have been two new fields cleared on the land by the complainants since the execution of said deed by said companies. These clearings

Moffat v. Schenck.

consist of about forty acres of land, upon which buildings have been erected, and said possessions have been occupied and cultivated continuously by the tenants of the defendants on down to the date of the filing of the bill in this cause.

J. M. Hall testified that he took possession of said land as the tenant of the defendants in the year 1890; that there was then a possession on said land consisting of about twenty-five acres, and that since that time there has been about forty additional acres cleared by the tenants of defendants, and that these latter possessions have been kept up continuously and cultivated each year.

Hugh Hall testified that he moved on the land in 1904, as the tenant of the defendants, and has been there seventeen years; that there are now three distinct possessions upon said land, the old place and two new ones; that the two new ones have been made since he went on the land, and have been kept up continuously until the present time and cultivated each year.

J. W. Hall testified that he moved on the land in controversy in 1897, and that the old possession, as well as the new ones, have been kept up continuously since that time, and that the tenants of the defendants have cleared and fenced something near forty acres since he moved on said land. The evidence shows that said new improvements or possessions have been made on the land by defendants' tenants since the year 1899, and these possessions have been occupied and the lands cultivated continuously without interruption on the part of any adverse claimants.

Moffat v. Schenck.

By chapter 26 of the Acts of 1913 it is provided:

"That married women be, and are, hereby fully emancipated from all disability on account of coverture, and the common law as to the disabilities of married women and its effect on the rights of property of the wife, is totally abrogated, and marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and do all acts in reference to property which she could lawfully do if she were not married; but every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy, and dispose of, all property, real and personal, in possession, and to make any contract in reference to it, and to bind herself personally, and to sue and be sued with all the rights and incidents thereof, as if she were not married."

By section 4448 of Shannon's Code it is provided:

"If the person entitled to commence an action is, at the time the cause of action accrued, either (1) within the age of twenty-one years, or (2) of unsound mind, or (3) a married woman, or (4) beyond the limits of the United States and the territories thereof, such person, or the (their) representatives and privies, as the case may be, may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action, unless it exceed three years, and in that case within three years from the removal of such disability."

Chapter 26 of the Acts of 1913, by which the disabilities of married women were clearly removed, went into

Moffat v. Schenck.

effect on January 1, 1914. The bill in the suit at bar was not filed until May 24, 1917. It is therefore clear that more than three years had elapsed between the date of its filing and the date when chapter 26 of the Acts of 1913 took effect. The complainants, however, take the position that the Act of 1913 removed, not only the disability of coverture from married women, but likewise cut off and removed the saving clause provided by section 4448 of Shannon's Code above quoted, giving them three years within which to sue after the removal of such disability. It is therefore insisted by the complainants that said saving clause having been suddenly cut off, the complainants had seven years after their disabilities were removed within which to bring suit. The case of *Jones et al. v. Coal Creek Mining & Manufacturing Co.*, reported in 133 Tenn., 160, 180 S. W., 179, is cited in support of this contention.

We do not think the holding in that case is controlling in the case at bar. The opinion in that case dealt with chapter 15 of the Acts of 1901, abolishing all exceptions to statutes limiting commencement of suits and actions in favor of persons beyond the limits of the United States and territories thereof. It was held that said statute removed the saving clause provided by section 4448 of Shannon's Code for the benefit of such persons, and that a right to sue could not be suddenly cut off, but a reasonable time must be given. The court held in that case that a reasonable time was not given short of the period of limitation, and in order to give the parties their day in court it was held that they had their full period of seven years within which to sue.

Moffat v. Schenck.

Chapter 26 of the Acts of 1913 does not undertake to repeal the saving clause given by section 4448 of Shannon's Code in favor of married women. It only removes the disabilities of married women, leaving the saving clause of the statute still in effect. That the complainants had the right to sue under the saving clause provided by section 4448 of Shannon's Code cannot be questioned, and, not having done so within the three years provided by the saving clause, it must be held that they are barred.

We cannot assent to the additional contention made by complainants that the Act of 1913, removing the disabilities of married women, only applies to property, real and personal in the possession of such women. The act expressly gives the right to a married woman to bind herself personally, "and to sue and be sued with all the rights and incidents thereof, as if she were not married."

It was expressly held in *McIrvin v. Lincoln Memorial University*, 138 Tenn., 260, 197 S. W., 862, L. R. A., 1918C, 191, that chapter 26 of the Acts of 1913, removed the exemption which otherwise would have excluded married women from the operation of the statute of limitations. That was a suit to recover for personal injuries commenced more than one year from the accrual of the cause of action. The injuries were sustained after the date upon which chapter 26 of the Acts of 1913 went into effect. It was contended by the complainant that the three years' saving clause provided by section 4448 of Shannon's Code applied, and by the defendant that it did not. It was held that the right of action was barred after one year. The only

Moffat v. Schenck.

difference between that case and the case at bar is that the cause of action in that case accrued after January 1, 1914, and in the suit at bar it accrued a number of years before.

It results that the decree of the chancellor will be affirmed, with costs.

State ex rel. v. Cummins.

STATE *ex rel.* THOMPSON *v.* CUMMINS, County Judge.

(Knoxville. September Term, 1918.)

STATUTES. Special laws. Discrimination. Counties.

Pub. Acts 1915, chapter 74, creating a constabulary for the State, and providing that expenses and compensation of members shall be paid by county or counties wherein services are rendered, but that counties having a population of 190,000 and over, according to the federal census of 1910, are exempt from the act, is unconstitutional, since no county but Shelby comes, or ever will come, within exception.

Acts cited and construed: Acts 1915, ch. 74.

Cases cited and approved: Redistricting Cases, 111 Tenn., 283; State *v.* Burnett, 53 Tenn., 188; Sutton *v.* State, 96 Tenn., 696; Woodard *v.* Brien, 82 Tenn., 520; Burkholz *v.* State, 84 Tenn., 71; Mayor *v.* Dearmon, 34 Tenn., 119; Moore *v.* State, 37 Tenn., 510; State *v.* Leonard, 86 Tenn., 487; State *v.* Maloney, 92 Tenn., 68; State *v.* Nine Justices, 90 Tenn., 726; Lauderdale County *v.* Fargason, 75 Tenn., 153; Burnett *v.* Maloney, 97 Tenn., 697; Bouldin *v.* Lockhart, 62 Tenn., 279; Lindsay *v.* Allen, 112 Tenn., 637; State *ex rel. v.* Trewhitt, 113 Tenn., 571; Morrison *v.* State, 116 Tenn., 534.

Case cited and distinguished: Weaver *v.* Davidson County, 104 Tenn., 315.

FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County.
—Hon. W. B. GARVIN, Chancellor.

State ex rel. v. Cummins.

WILLIAM H. SWIGGART, JR., Assistant Attorney-General, for relator.

WILL F. CHAMLEE, for county judge.

MR. JUSTICE McKINNEY delivered the opinion of the Court.

The only question involved in this cause is the constitutionality of chapter 74 of the Public Acts of 1915, which is as follows:

"An act to create a constabulary for the State of Tennessee, to be designated and known as the State Rangers, and to provide for their appointment and to define their powers and duties.

"Provided: "That this act shall not apply to counties having a population of 190,000 and over according to the federal census of 1910.

"Whereas, the Governor of Tennessee and the civil authorities of the several counties of the State are charged by law with the duty of protecting persons and property and of enforcing the laws and preserving the peace of the state:

"And whereas, conditions sometimes arise where the Governor and civil authorities are called upon and expected to preserve order and protect persons and property from the violence of organized forces:

"And, whereas, the State of Tennessee has not heretofore provided either the means or the authority to enable the performance of these duties:

"Section 1. Therefore, be it enacted by the General Assembly of the State of Tennessee, that there be hereby created a State constabulary, to be designated

State ex rel. v. Cummins.

and known as the State rangers, to consist of ten members who shall be appointed by the Governor and who shall hold office for the term of ten years, subject to removal by him for sufficient cause.

"Said ten members, when so appointed, shall constitute the regular force and shall be vested with and possess all the powers conferred upon the sheriff by section 4933 of the Code of 1858.

"Sec. 2. Be it further enacted, that when acts of violence occur in any county of the State whereby the rights of persons or property are violated or jeopardized by organized forces, or by any considerable number of persons acting in conjunction or singly, and which may be brought to the attention of the Governor, he shall, in his discretion, direct the State rangers to police such county, or any part thereof, so disturbed, to suppress such acts of violence and to arrest all persons engaged or aiding and abetting therein.

"Sec. 3. Be it further enacted, that the State rangers be attached to the adjutant general's office and by him organized and equipped for duty under the direction of the Governor, but they shall at all times be at the command of the Governor and under his general supervision and control.

"Sec. 4. Be it further enacted, that each regular member of the State rangers shall receive as compensation for his services three dollars *per diem* and necessary expenses while actually engaged in the discharge of any official duty, the same to be paid upon voucher from the adjutant general's office out of any moneys in the state treasury not otherwise appropriated.

"Sec. 5. Be it further enacted, that each of the regular members of the State rangers appointed by

State ex rel. v. Cummins.

the Governor under section 1 of this act shall have authority to summon and swear in the *posse comitatus* when necessary to meet any emergency and when for any reason, the Governor may not be able to appoint and supply the special members or force hereinafter provided for. The posse may be summoned from any county or counties in the State, in the discretion of the ranger, and the members thereof shall receive as compensation for their services two dollars *per diem* and necessary expenses while actually engaged in the service, the same to be paid as hereinafter provided.

“Sec. 6. Be it further enacted, that the Governor shall appoint such special members of the State rangers as may be necessary to aid the regular force effectually perform the duties herein imposed upon them, the period of their service, however, to extend no longer than the exigencies may demand.

“Such special members shall receive for their services the same compensation allowed the members of the *posse comitatus* in section five of this act, the same to be paid as hereinafter provided.

“Sec. 7. Be it further enacted, that the *per diem* and necessary expenses, which shall include all transportation of the members and equipment of the *posse comitatus* and of the special members as provided for in sections five and six of this act shall be paid by the county or counties wherein the service may be rendered, upon an itemized statement certified from the adjutant general’s office showing the service rendered on behalf of such county or counties and upon the proper rendition of such account the county court of such county or counties shall provide for the payment of same, which

State ex rel. v. Cummins.

shall be by warrant drawn by the county judge or chairman and in favor of the State.

"Sec. 8. Be it further enacted, that this act shall not apply to counties having a population of 190,000 and over according to the federal census of 1910.

"Sec. 9. Be it further enacted, that this act take effect from and after its passage, the public welfare requiring it."

The chancellor held the act to be unconstitutional because in violation of article 11, section 8, of the State Constitution, which provides that the legislature shall have no power to suspend any law for the benefit of any particular individual, nor to pass any law for the benefit of any individuals inconsistent with the general law of the land, nor to pass any law granting to any individual rights, privileges, immunities, or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law.

It is apparent that this act is a general law from which Shelby county was excepted. No other county comes within the exception, or can ever come within the exception by any subsequent federal census.

The case, therefore, falls within the rule announced in the *Redistricting Cases*, 111 Tenn., 283, 80 S. W., 761; which rule is supported by *State v. Burnett*, 6 Heisk., 188; *Sutton v. State*, 96 Tenn., 696, 36 S. W., 697, 33 L. R. A., 589; *Woodard v. Brien*, 14 Lea, 520; *Burkholtz v. State*, 16 Lea, 71; *Mayor v. Dearmon*, 2 Snead, 119 and *Weaver v. Davidson County*, 104 Tenn., 315, 59 S. W., 1105, to wit:

"No benefit shall be conferred or no burden imposed upon the citizens of any given county, which by the

State ex rel. v. Cummins.

same act is not conferred upon or imposed upon all of the citizens of all of the other counties in the State who may be able to bring themselves, or may be brought, within the terms of the act conferring the benefit or imposing the burden."

The court then says:

"It is apparent, therefore, that these cases do not oppose the hypothesis that the legislature may pass special laws for the regulation of individual counties, by name, as arms of the State government, or subordinate political entities, as distinguished from the personal relations of their several citizens.

"It is equally obvious that while *Moore v. State*, 5 Sneed, 510, *State v. Leonard*, 86 Tenn., 487, 7 S. W., 453, *State v. Maloney*, 92 Tenn., 68, 20 S. W., 419, *State v. Nine Justices*, 90 Tenn., 726, 18 S. W., 393, *Lauderdale County v. Ferguson*, 7 Lea, 153, and *Burnett v. Maloney*, 197 Tenn., 697, 702, 703, 37 S. W., 689, 34 L. R. A., 541, (as to its first point) do not necessarily establish the hypothesis, inasmuch as they rest upon special clauses of the Constitution which were held to confer or permit the power of special legislation in respect of matters falling thereunder, yet they furnish very useful analogies that point to the conclusion indicated by the hypothesis just referred to."

It will thus be seen that the cause under consideration is not a special law for individual counties, as arms of the State government; neither does it fall within the line of cases recited above, which rest upon special clauses of the Constitution, but falls within the line of cases holding unconstitutional all acts which confer benefits or impose burdens upon citizens of some counties and not upon others.

State ex rel. v. Cummins.

It is not insisted by the State that if the exception to the act is unconstitutional that the remainder of the act is valid, and our decisions are to the contrary. *Burkholtz v. State*, 16 Lea, 73; *Bouldin v. Lockhart*, 3 Baxt., 279; *Weaver v. Davidson County*, 104 Tenn., 315, 59 S. W., 1105; *Lindsay v. Allen*, 112 Tenn., 637, 82 S. W., 171; *State ex rel. v. Trewhitt*, 113 Tenn., 571, 82 S. W., 480; *Morrison v. State*, 116 Tenn., 534, 95 S. W., 494.

The learned chancellor was correct in holding the act in question unconstitutional and in dismissing the complainant's bill, and his decree is in all things affirmed.

In re Lumber & Mfg. Co.

Petition of SOUTHERN LUMBER & MFG. Co. NEW RIVER LUMBER Co. v. TENNESSEE Ry. Co. *et al.* TENNESSEE Ry. Co. v. STANDARD TRUST Co. *et al.*

(Knoxville. September Term, 1918.)

1. COURTS. Judgment. Jurisdiction by consent or waiver. Collateral attack.

When the court has no jurisdiction of the subject-matter, it cannot be conferred either by waiver or consent, and all of its orders and decrees are a nullity, and may be collaterally attacked. (*Post*, p. 329.)

Cases cited and approved: Agee v. Dement, 20 Tenn., 332; White v. Buchanan, 46 Tenn., 32; Noel v. Scoby, 49 Tenn., 20; Ferris v. Fort, 2 Tenn., Ch. 150; Board v. Bodkin Bros., 108 Tenn., 700; Baker v. Mitchell, 105 Tenn., 610.

2. APPEAL AND ERROR. Courts. Jurisdiction of subject-matter. Objections.

The question of jurisdiction of the subject-matter can be raised at any time in any court, and may be considered by the supreme court on appeal. (*Post*, pp. 329-340.)

Cases cited and approved: Penn. R. R. Co. v. International Coal Co., 230 U. S., 184; Southern Railway Co. v. Tift, 206 U. S., 428; Texas & Pacific R. R. Co. v. Abilene Cotton Oil Co., 204 U. S., 426; Penn. R. R. Co. v. Clark Coal Co., 238 U. S., 456.

Cases cited and distinguished: Penn. R. R. Co. v. Puritan Coal Co., 237 U. S., 121; Ill. Cent. R. R. Co. v. Mulberry Hill Coal Co., 238 U. S., 275.

3. COMMERCE. Interstate commerce act. Remedies of shipper.

Interstate Commerce Act, section 22 (U. S. Comp. St. section 8595), providing that nothing in the act shall abridge existing remedies, but that the provision of the act shall be in addition thereto, reserves to the shipper his remedies existing at common law or statute, in so far as they do not conflict with the provisions of

In re Lumber & Mfg. Co.

the act, so that, where no administrative question is involved, and the shipper does not invoke the aid of the Interstate Commerce Commission, he may prosecute his common-law or statutory remedies. (*Post*, pp. 340, 341.)

4. COMMERCE. Interstate commerce commission. Procedure. Remedies of shippers.

Where a shipper applies to the Interstate Commerce Commission in regard to discrimination, he must proceed in accordance with the Interstate Commerce Act. (*Post*, p. 341.)

5. COMMERCE. Actions for damages against carriers. Interstate commerce. Procedure.

Interstate Commerce Act, section 9 (U. S. Comp. St. section 8573), allowing persons damaged by any common carrier to complain to the Interstate Commerce Commission, or to bring suit for damages in federal courts, provides two methods for the ascertainment of damages, which are exclusive, one to the commission, and the other to the federal courts. (*Post*, p. 341.)

6. COURTS. Shippers' actions for damages. Action on award of interstate commerce commission. Jurisdiction of federal and state courts.

Under Interstate Commerce Act, section 16 (U. S. Comp. St. section 8584), relating to awards of damages to shippers, when an award has been made by the Commission, but such order has not been complied with by the carrier, the shipper may institute suit either in the federal or state court. (*Post*, p. 341.)

7. COURTS. Actions for discrimination. jurisdiction of state court.

The State court has no jurisdiction of a suit by a shipper to recover damages for discrimination against a common carrier, based on a finding of the Interstate Commerce Commission reducing rates for freight shipments on the ground of disermination; no award of damages having been made by the Commission. (*Post*, p. 341.)

FROM SCOTT.

Appeal from the Chancery Court of Scott County.—
Hon. HUGH G. KYLE, Chancellor.

In re Lumber & Mfg. Co.

A. W. AKERS and PERKINS BAXTER, for petitioner.

H. M. CARR, for receiver.

MR. JUSTICE McKINNEY delivered the opinion of the Court.

The complainant is a corporation engaged in the lumber and stave business, and for several years has operated a sawmill at Nick's Creek, Tenn.

The defendant Tennessee Railway Company owns sixty miles of railroad in Tennessee, and connects with the Cincinnati, New Orleans & Texas Pacific Railway Company at Oneida, Tenn. Under an agreement with the Cincinnati, New Orleans & Texas Pacific Railway Company, the Tennessee Railway Company received freight on its line for interstate shipment, and it is conceded that it was engaged in interstate transportation.

Nick's Creek and Norma are two stations on the road of the Tennessee Railway Company—the former being thirty miles from Oneida and two hundred forty miles from Cincinnati; the latter being twenty-two miles from Oneida and two hundred thirty-two miles from Cincinnati.

Since 1906 the published tariff on lumber from Norma to Cincinnati has been fifteen cents per hundred pounds, while the rate from March 1, 1914, has been seventeen one-half cents per hundred pounds from Nick's Creek to Cincinnati.

On December 9, 1915, the complainant filed a complaint before the Interstate Commerce Commission against the Tennessee Railway Company and the Cincinnati, New Orleans & Texas Pacific Railway Com-

In re Lumber & Mfg. Co.

pany, charging that the rate of 17½ cents from Nick's Creek to Cincinnati was unreasonable, and that said rate, when compared with the rate of 15 cents from Norma to Cincinnati, was unduly prejudicial to complainant and Nick's Creek, and unduly preferential to Norma and those doing business at that point.

Answers were filed, proof taken, and a hearing had, and it was decreed by said Interstate Commerce Commission that said rate of 17½ cents from Nick's Creek to Cincinnati was not unreasonable, but that same was prejudicial and discriminatory, and it was decreed that defendant should in the future only charge 1 cent per hundred pounds more from Nick's Creek to Cincinnati than it charged from Norma to Cincinnati, which, on the then tariff, would make the rate from Nick's Creek to Cincinnati 16 cents per hundred pounds. This order was made on October 12, 1917.

The defendant Tennessee Railroad Company was being administered in the chancery court of Scott county, Tenn., as an insolvent corporation, in the above-styled causes; Byrd M. Robinson being its receiver.

On January 31, 1918, this suit was instituted by a petition being filed in the above causes, in which the New River Lumber Company set forth the foregoing facts, and further charged that said discrimination, as found by the Interstate Commerce Commission, was in violation of the Interstate Commerce Act (Act Cong. Feb. 4, 1887, chapter 104, 24 Stat. 379), and that it was damaged in the sum of \$6,000 on account thereof, and prayed for a decree for that amount.

After the cause was put at issue, the matter was referred to the master to report as to damages. It is not necessary to go into detail as to this matter, further

In re Lumber & Mfg. Co.

than to say that the master filed his report, to which both parties filed exceptions, and after hearing the whole matter the chancellor dismissed the petition of the complainant, on the ground that it had not sufficiently shown itself entitled to any damages.

The period during which the complainant shipped lumber from Nick's Creek to Cincinnati and points beyond, and upon which it paid a rate of $17\frac{1}{2}$ cents, was from September 1, 1915, to November 1, 1917, and the difference in freight on this lumber, had a charge of only 16 cents been made, as was found to be proper by the Interstate Commerce Commission, would have amounted to \$2,844.71, and the complainant insists it is damaged in this sum.

The complainant has brought the case to this court by appeal and has assigned errors.

The defendant, for the first time in this court, raises a question of jurisdiction, and says that under the federal act to regulate commerce the state court is without jurisdiction in a case of this character.

It is well settled that, when the court has no jurisdiction of the subject-matter, it cannot be conferred either by waiver or consent, and all of its orders and decrees are a nullity, and may be collaterally attacked. *Gibson's Suits in Chancery (New)*, par. 290; *Agee v. Dement*, 1 Humph., 332; *White v. Buchanan*, 6 Cold., 32; *Noel v. Scoby*, 2 Heisk 20; *Ferris v. Fort*, 2 Tenn. Ch., 150; *Board v. Bodkin Bros.*, 108 Tenn., 700, 69 S. W., 270; *Baker v. Mitchell*, 105 Tenn., 610, 59 S. W., 137.

In *Penn. R. R. Co. v. International Coal Co.*, 230 U. S., 184, 33 Sup. Ct., 893, 57 L. Ed., 1446, Ann. Cas., 1915A, 315, the question of jurisdiction was raised for the first time in the supreme court of the United States, and the

In re Lumber & Mfg. Co.

court considered the question and held that it had jurisdiction. The question of jurisdiction of the subject-matter can be raised at any time in any court, and we think it proper for this court to consider that question here, and the case of *Southern Railway Co. v. Tiffts*, 206 U. S., 428, 27 Sup. Ct., 709, 51 L. Ed., 1124, 11 Ann. Cas., 846, relied on by the complainant, is not in conflict with this holding.

In order to a proper understanding of this question of jurisdiction it becomes necessary to consider certain parts of the federal act to regulate commerce, together with its amendments, as well as some of the decisions of the supreme court of the United States construing the same. The provisions of the Interstate Commerce Act bearing upon this question are as follows:

“Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney’s fee, to be fixed by the court in every case of recovery, which attorney’s fee shall be taxed and collected as part of the costs in the case.

“Sec. 9. [in so far as here material]. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common

In re Lumber & Mfg. Co.

carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

"Sec. 16 [in so far as here material]. That if, after hearing on a complaint made as provided in section thirteen of this act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, *or in any State court of general jurisdiction having jurisdiction of the parties*, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the *Circuit Court of the United States* shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima-facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they

In re Lumber & Mfg. Co.

accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court or *State court* within one year from the date of the order, and not after." [Part *underscored* were added by Act June 18, 1910.]

"Sec. 22 [in so far as here material]. Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." U. S. Comp. St., sections 8572, 8573, 8584, 8595.

Without a careful analysis of these provisions it may appear that the State courts have jurisdiction of every character of a case that may arise with reference to transportation of commerce under either the common law or the Interstate Commerce Act, and it requires a careful application of the decisions of the supreme court of the United States to these several provisions in order to determine just how far the jurisdiction of the State courts extends.

Texas & Pacific R. R. Co. v. Abilene Cotton Oil Co., 204 U. S., 426, 27 Sup. Ct., 350, 51 L. Ed., 553, 9 Ann. Cas., 1075, was an action instituted in the State court to recover moneys alleged to have been paid for transportation of cotton seed over and above a just and reasonable charge; it being averred that the rate exacted was discriminatory, constituting an undue prefer-

In re Lumber & Mfg. Co.

ence. It appeared that the rates charged were those established by the railway company under the Interstate Commerce Act. It was insisted by the plaintiff that, the action being one recognized at the common law, under the authority of section 22 of the Interstate Commerce Act the action could be maintained either in the State or the federal court. On the other hand, it was insisted by the defendant that the court was without jurisdiction, for the reason that the question of discrimination was an administrative one, which, under the act, should be passed upon by the Interstate Commerce Commission and not by the court. The court adopted the theory of the defendant. It held that the matter complained of was actionable at common law, but that, in a case of this kind, such action was destroyed or taken away by the Interstate Commerce Act, but that in all other respects the common-law or statute rights or remedies remained. In other words, the spirit of the Interstate Commerce Act was to provide for uniform, equal, and just rates, and to prohibit unreasonable and discriminatory charges; the court saying, in effect, that, if it were left to the courts to determine this question, one court and jury might hold a certain rate reasonable, while another court and jury might hold the same rate unreasonable, and that as a result there would not be a uniform rate, and the very object for which the law was enacted would be defeated. This question is fully and ably reasoned out in that opinion. Speaking as to the effect of section 22, the court on page 447 of 204 U. S., on page 357 of 27 Sup. Ct. (51 L. Ed. 553, 9 Ann. Cas. 1075), says:

"But it is insisted that, however cogent may be the views previously stated, they should not control, because

In re Lumber & Mfg. Co.

of the following provision contained in section 22 of the act to regulate commerce, viz: ‘. . . Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.’ This clause, however, cannot in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act.”

Penn. R. R. Co. v. Puritan Coal Co., 237 U. S., 121, 35 Sup. Ct., 484, 59 L. Ed., 867, was a case where the jurisdiction of the State court was sustained, where the aid of the Interstate Commerce Commission had not been invoked. The court, on pages 131 and 132 of 237 U. S., on pages 487 and 488 of 35 Sup. Ct. (59 L. Ed. 867), said:

“There are several decisions, already cited, which hold that suits against railroads for unjust discrimination in interstate commerce can only be brought in the federal courts. But it must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule and the other in the unfair enforcement of a reasonable rule. In a suit where the rule of

In re Lumber & Mfg. Co.

practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States courts of competent jurisdiction as provided in section 9.

"But if the carrier's rule, fair on its face, has been unequally applied, and the suit is for damages occasioned by its violation or discriminatory enforcement, there is no administrative question involved; the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits, though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the State or federal courts."

In *Illinois Central R. R. Co. v. Mulberry Coal Co.*, 238 U. S., on pages 282, 283, 35 Sup. Ct., 760, 763 (59 L. Ed., 1306), the court says:

"Upon a review of sections 8 and 9 of the act to regulate commerce, and of the proviso in section 22 which declares that 'nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies,' we held . . . that, while the act gave shippers new rights, it at the same time preserved existing causes of action; that it

In re Lumber & Mfg. Co.

did not supersede the jurisdiction of state courts in any case, new or old, where the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission, or relate to a subject as to which the jurisdiction of the federal courts had otherwise been made exclusive; that in actions against railroad companies for unjust discrimination in interstate commerce, where the rule of distribution itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the authority of the Interstate Commerce Commission; but, if the action is based upon a violation or discriminatory enforcement of the carrier's own rule for car distribution, no administrative question is involved, and such an action, although brought against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the State or the federal courts. And because in that case the action was not based upon the ground that the carrier's rule of car distribution was unreasonable or discriminatory, but that plaintiff was damaged by reason of the carrier's failure to furnish it with cars to which it was entitled even upon the basis of the carrier's own rule of distribution, it was held that the State court has jurisdiction without previous application to the Interstate Commerce Commission."

It will thus be seen that, under these authorities, the complainant in this suit could not prosecute its claim in either the federal or the State court, but that it was necessary for it to resort to the Interstate Commerce Commission, which it did, with the result previously stated.

In re Lumber & Mfg. Co.

We have been unable to find where the supreme court of the United States has passed upon the exact question here involved, but the case of *Penn. R. R. Co., v. Clark Coal Co.*, 238 U. S., 456, 35 Sup. Ct., 896, 59 L. Ed., 1406, is nearly in point and very persuasive.

That action was brought in a State court to recover damages for inadequate and unjustly discriminatory car service and supply. The State statute prohibited unjust discrimination, and provided that a carrier guilty of such conduct for such discrimination should be liable for damages treble the amount of injury suffered. The railroad company insisted that the court had no jurisdiction, upon the ground that with respect to car distribution the claim was cognizable only by the Interstate Commerce Commission or by the courts of the United States. It also appeared that in a proceeding before the Commission, which the plaintiff had instituted against the defendant prior to the beginning of the action, the Commission had found that the method of car distribution practiced by the defendant was unjustly discriminatory, and the Commission had made an award of damages accordingly, and it was urged that by reason of this proceeding and the action of the Commission the plaintiff was precluded from maintaining that action, so far as it related to the alleged loss sustained with respect to the mines considered by the Commission. These contentions were overruled by the trial court, and the jury found that the defendant had been guilty of unjust discrimination, and assessed the damages at \$41,481, and trebling the amount a judgment was entered for \$124,443, which judgment was affirmed by the supreme court of the State. The

In re Lumber & Mfg. Co.

supreme court of the United States held that the question of whether the rule or method of car distribution practiced by the railroad company was unjustly discriminatory was one which the Commission had authority to pass upon; that by reason of the nature of the question involved in an attack upon the method of distributing cars no action was maintainable in any court to recover damages alleged to have been inflicted thereby until the Commission had made its finding as to the reasonableness of the rule; that the Commission had authority to make examination and report upon the amount of damages which the plaintiff had suffered from the unjust discrimination alleged in its complaint; and that where it appears that the act has been violated, and the requisite ruling as to the unreasonableness of the practice assailed has been made by the Commission, section 9 of the Commerce Act is applicable. And with reference to said section the court said:

“This provision defines the remedies to which a person in the situation of the plaintiff is entitled, and the terms of the provision clearly indicate that these remedies are exclusive. The express requirement of an election between the proceeding before the Commission and suit in the federal court leaves no room for the conclusion that there is an option in such case to resort to the State court. Where the proceeding has been had before the Commission and reparation awarded, suit under section 16 (as amended in 1910) may be brought in either a State or federal court, but this is after the Commission’s award has been made.”

In response to the insistence that no administrative question was involved the court said:

In re Lumber & Mfg. Co.

"It is said that the present action is brought to recover damages caused by the violation or discriminatory enforcement of the carrier's own rule, and that in such case, no administrative question being involved, resort to the Commission was not necessary. And this, it is urged, was held in *Penna. R. R. v. Puritan Coal Co.*, 237 U. S., 121, 35 Sup. Ct., 484, 59 L. Ed., 867. See, also, *Illinois Central R. R. v. Mulberry Hill Coal Co.*, decided June 14, 1915, 238 U. S., 375, 35 Sup. Ct., 760, 59 L. Ed., 1306. The distinction, however, is apparent. In the cases cited the plaintiff had not invoked the jurisdiction of the Commission. In this case, it had done so. It went before the Commission, with its complaint under the act, assailing the rule of the company, and it secured from the Commission a finding as to the illegality of the rule and the violation of the act. This proceeding established the character of the claim so far as interstate transactions were concerned, and it could be prosecuted solely under the federal statute. This follows necessarily from the supremacy of the federal legislation in relation to interstate commerce. So long as the creative provisions of the federal act did not appear to be involved, and the wrong was not disclosed in the aspect presented by the Commission's finding, the plaintiff was free to avail itself of common-law remedies or of those afforded by local statutes. But when, as a result of its own insistence upon its federal right under the act, it appeared that the act had been violated and that the special remedial provisions of the act were applicable, it was not possible for the plaintiff to ignore the statute it had thus called into play and disregard its provisions for the purpose of measuring relief by local standards.

In re Lumber & Mfg. Co.

The federal statute governed the plaintiff no less than the defendant. In the situation in which the plaintiff stood after the Commission's finding, that statute determined the extent of the damages it was entitled to recover with respect to interstate sales and shipments, and the plaintiff was not free to seek another remedy in the state court and there to secure treble damages under the State statute with respect to the same transactions.

"This is not to say that the finding of the Commission as to the amount of damages has any other effect than that prescribed in section 16 of the act. It is simply to hold that the plaintiff, having demanded and obtained the appropriate ruling from the Commission as to the discrimination which had been practiced, was then entitled to proceed for the recovery of damages in accordance with the act, and not otherwise. The fact that the Commission had not made its award of damages at the time the action was brought is immaterial. The proceeding before the Commission was pending and the plaintiff's right and remedy were fixed by the federal act.

"We conclude, therefore, that with respect to the damage sustained by the plaintiff in its interstate business, by reason of the unjustly discriminatory distribution of cars for interstate shipments, the plaintiff was not entitled to maintain this action under the State statute."

From the foregoing authorities we reach the following conclusions:

1. That section 22 simply reserves to the shipper his remedies existing at common law or by statute in so far as same do not conflict with the provisions of the

In re Lumber & Mfg. Co.

act; that is to say, that where no administrative question is involved, as defined in *Texas & Pacific R. R. Co. v. Abilene Cotton Oil Co.*, supra, and where the shipper does not invoke the aid of the Commission, he may prosecute his common-law or statutory remedies.

2. That where he applies to the Commission he must proceed in accordance with the act.

3. That the act (section 9) provides two methods for the ascertainment of damages, which are exclusive—one to the Commission and the other to the federal court.

4. That by section 16, when an award of damages has been made by the Commission, and the order awarding same is not complied with, the shipper may then institute suit in either the federal or the State courts.

5. That the complainant's suit does not fall within any of these provisions and the chancery court was therefore without jurisdiction to determine the questions raised by the pleadings in this cause.

Since the court is without jurisdiction it is unnecessary to pass upon the other questions submitted.

The decree of the chancellor is therefore affirmed, with costs.

West Const. Co. v. Seaboard Air Line Ry. Co.

WEST CONST. CO. V. SEABOARD AIR LINE RY. CO.

(*Knoxville*. September Term, 1918.)

1. **CARRIERS.** Carriage of freight. Injury. Damages. Overhead expenses.

In an action against a carrier for damage to an asphalt plant transported by it and wrecked in transit, no recovery could be had for overhead expenses due to the enforced idleness of plaintiff's workmen, such item of damages not being in contemplation of the parties. (*Post*, pp. 344-346.)

2. **CARRIERS.** Action for damage to goods. Interest on amount of recovery.

In an action against a carrier for damages to an asphalt plant in transit, it was within the discretion of the chancellor to allow interest on cost of repairs paid by complainant, recovery of which was sought from carrier. (*Post*, pp. 344-346.)

3. **CARRIERS.** Carriage of freight. Contract as to rate. Validity.

Where a railroad company inspects and classifies as pitch material which is claimed to be asphaltum, and enters into a contract with a shipper to transport it for a given sum, the contract is binding notwithstanding that the rate charged is less than the authorized tariff rate, in the absence of a showing of mistake. (*Post*, pp. 346, 347.)

4. **CARRIERS.** Carriage of goods. Contract for transportation. Waiver.

Where a shipper under protest pays a higher rate than called for by the contract under which material is shipped, in order to obtain the material which he needed, such payment is not a waiver of the contract. (*Post*, pp. 346, 347.)

FROM HAMILTON.

Appeal from the Chancery Court of Hamilton County.—Hon. W. B. GARVIN, Chancellor.

West Const. Co. v. Seaboard Air Line Ry. Co.

WILLIAMS & LANCASTER, for West Const. Co.

BROWN, SPURLOCK & BROWN, for Seaboard Air Line Ry. Co.

MR. JUSTICE MCKINNEY delivered the opinion of the Court.

This is a damage suit. The complainant delivered its asphalt plant to the defendant at Bartow, Fla., to be transported to Chattanooga, Tenn. The car in which said plant was loaded was wrecked in transit, and the plant was badly damaged.

The damage was repaired at a cost of \$1,358.30, which was paid by the complainant. The defendant declined to reimburse the complaint, and suit was brought to recover same, with interest.

On account of this injury complainant was deprived of the use of said plant for thirty-seven days, during which time complainant's force, used in operating said plant, remained idle, and on this account complainant also seeks to recover, as damages, the sum of \$1,800, as overhead expenses.

The chancellor decreed in favor of the complainant for the \$1,358.30, with interest, but held that the complainant was not entitled to recover the \$1,800, but did hold that it was entitled to recover the reasonable rental value of said plant for the thirty-seven days that it was deprived of the use of same, and referred the matter to the master for the purpose of having said rent ascertained.

The defendant filed a cross-bill, in which it undertook to recover \$32.97 rent, unpaid freight charges amounting to \$713.25, and \$13 demurrage, aggregating \$759.22.

West Const. Co. v. Seaboard Air Line Ry. Co.

The defendant to the cross-bill answered, admitting the indebtedness set forth in the cross-bill, and by way of cross-bill to the cross-bill set up a claim of \$40 for loss on stone in transportation, and \$769.08 overcharges made by the defendant on pitch shipped over defendant's railroad from Tampa to Bartow.

The chancellor disallowed the claim of \$40, but allowed the freight overcharge of \$769.08.

The item of \$40 is not insisted on by complainant, and complainant only assigns one error, which goes to the action of the chancellor in fixing the measure of special damages.

The proof shows that when this plant was delivered to the railroad for transportation at Bartow, Fla., its agent was notified that the complainant had a large contract in Chattanooga awaiting execution, and that it was necessary to transport said plant with all speed possible.

We do not think the item of damages, as claimed by the complainant, can be sustained, for the reason that same was not within the contemplation of the parties. The defendant was not advised that the delay in transporting this plant would result in a serious loss by virtue of said overhead expenses, and this assignment of error is disallowed.

The first assignment of error made by the cross-complainant is to the action of the chancellor in allowing interest on the \$1,358.30 item. Complainant was not entitled to interest as a matter of law, but it was discretionary with the chancellor as to allowing interest, and in this instance we do not think there was any abuse of such discretion.

West Const. Co. v. Seaboard Air Line Ry. Co.

The second and third assignments of error go to the action of the chancellor in allowing \$768.88 overcharges.

This was not erroneous. The record discloses that the rate on asphaltum from Tampa to Bartow was eight cents per hundred pounds more than it was on pitch. The material came from Pitch Lake in the Island of Trinidad. Upon its arrival in Tampa, Mr. Redmon, treasurer of the complainant company, went to the defendant's manager of inspection and classification, and had him to classify this material and make a rate on same, and thereupon, same was classified and billed as pitch. When this material arrived in Bartow, the local agent of the defendant railway company demanded eight cents per hundred pounds more than the railway company had contracted to transport said material for, and complainant, being badly in need of this material, paid this advanced rate, amounting to \$768.88, paying same, however, under protest. It seems that the matter was then brought before the Railroad Commission in Florida, but there is no valid proof showing its finding. It appears that the complainant did not undertake to collect this sum from the railroad company. Neither did the railroad company undertake to collect from the complainant the items for rent, freight charges, and demurrage amounting to \$759.22, the parties having, in effect, treated one as an offset of the other, and neither of these claims were attempted to be enforced until this suit was instituted to recover damages sustained by the complainant on account of the injury to its asphalt plant. The complainant has not shown clearly whether this material was asphaltum or pitch. No proof was introduced by the defendant. It does appear, however, that the rail-

West Const. Co. v. Seaboard Air Line Ry. Co.

road company, through its inspector and classifier, classified this material as pitch, and entered into a contract with complainant by which it agreed to transport same to Bartow for a given sum.

We think this was a binding contract, and the only way that the defendant could avoid the binding effect of said contract would be to show that by mistake it agreed to transport said material for eight cents per hundred pounds less than the tariff rate, and this it has not done. The fact that the complainant paid this high rate upon the material reaching Bartow does not change the result, since it appears that the complainant was very badly in need of this material, and in order to procure same paid this excessive charge, but under protest. We think the complainant pursued a wise course in this matter, and its action in obtaining this material as it did, so as to enable it to complete its contract in Bartow, was in no wise a waiver of its right to insist on the contract, and we cannot see that the defendant's rights were in any wise prejudiced thereby.

In 6 Cyc., at page 498, it is said:

"If freight in excess of the amount contracted for, or a reasonable rate, in the absence of contract, is demanded, either as a condition precedent to accepting the goods for transportation or to their delivery at the end of the transportation, the consignor or the consignee, as the case may be, may pay under protest and bring action to recover back the excess."

And again, in 30 Cyc., at page 1308, it is said:

"Where a person unlawfully demanding a payment is in a position to seize or detain the goods or other personal property of a person against whom the claim

West Const. Co. v. Seaboard Air Line Ry. Co.

is made, without a resort to judicial proceedings in which the parties may contest the validity of the claim, payment under protest to recover or retain the property will be considered as made under compulsion, and the money can be recovered back, at least where a failure to get or retain immediate possession and control of the property would be attended with serious loss or great inconvenience."

Numerous authorities are cited in support of the two foregoing texts. If, as a matter of fact, the defendant had contracted to transport this material for a lower rate than that fixed by the tariff, it could have very easily shown that fact.

We find no error in the decree of the chancellor, and same is affirmed, and the cause is remanded for further proceedings:

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
MIDDLE DIVISION.

KNOX BROS. v. E. W. WAGNER & CO.*

(Nashville. December Term, 1918.)

1. PLEADING. Demurrer to pleas in abatement.

On demurrer to pleas in abatement to the jurisdiction, the averments of such pleas must be taken as true. (*Post*, pp. 351-352.)

Acts cited and construed: Acts 1859-60, ch. 89.

Constitution cited and construed: Art. 1, sec. 8.

2. PARTNERSHIP. Process. Due process of law.

A summons to a partnership, whose members are not resident within the state, served upon their local manager, in accordance with Thompson Shannon Code, section 4542, is insufficient, where a merely personal judgment is sought against the parties. (*Post*, pp. 352-356.)

3. CONSTITUTIONAL LAW. Due process. Service on manager of partnership.

Thompson-Shannon Code, section 4542, is so far as it authorizes service upon a nonresident partnership, composed of nonresident partners, by delivery of summons to its local manager or agent

*On the question as to what service of process is sufficient to constitute due process of law, see note in 50 L. R. A., 577.

Knox Bros. v. Wagner & Co.

within the state, is in violation of Constitution. U. S. Amend. 14, section 1, relating to due process of law. (*Post*, pp. 352, 356.)

Acts cited and construed: Acts 1859-60, ch. 89.

Cases cited and approved: Louisville, etc., R. Co. v. Nash, 118 Ala., 477; Weaver v. Boggs, 38 Md., 255; Moredock v. Kirby (C. C.) 118 Fed., 180; Aikmann v. Sanderson, 122 La., 265; Coughlin v. Pinkerton, 41 Wash., 500; Pennoyer v. Neff, 95 U. S., 714; Toppins v. Railroad, 73 Tenn., 600; Railroad v. Walker, 77 Tenn., 481; Green v. Snyder, 114 Tenn., 100.

Case cited and distinguished: Flexner v. Farson et al., 268 Ill., 435.

Code cited and construed: Sec. 4542 (T. S.)

FROM DAVIDSON.

Error to the Circuit Court of Davidson County.—
THOS. E. MATTHEWS, Judge.

JAS. L. WATTS, GEORGE E. BANKS, JR., and TATUM,
THACH & LYNCH, for plaintiffs in error.

THOS. G. WATKINS and LEE BROCK, for defendants in
error.

MR. JUSTICE HALL delivered the opinion of the court.

An action brought in the circuit court of Davidson county by W. C. Knox and I. L. Knox, composing the firm of Knox Bros., against E. W. Wagner & Co., to recover the sum of \$3,000, alleged to have been deposited by the plaintiffs in error with E. W. Wagner & Co. as margins on alleged wagering contracts on the future price of wheat, which sum, it is alleged, was lost by the plaintiffs in error to the said E. W. Wagner & Co. in said wagering transactions.

Knox Bros. v. Wagner & Co.

Summons was issued to the sheriff of Davidson county, directing him to summon E. W. Wagner & Co. to answer the complaint of the plaintiffs below. The sheriff executed said summons by serving it on one T. M. Pritchett, the local manager of E. W. Wagner & Co. in Davidson county.

Pleas in abatement to the jurisdiction of the court were filed by E. W. Wagner and Ernest Tietgens, averring that E. W. Wagner & Co. was not a corporation, but was a partnership composed of E. W. Wagner and Ernest Tietgens; that E. W. Wagner and Ernest Tietgens were nonresidents of the State of Tennessee, and were citizens and residents of the State of Illinois, at the time said suit was instituted, and at the time process in the same was issued and served on T. M. Pritchett, and were still such nonresidents of Tennessee and residents of the State of Illinois, and had so been for a long time prior to the institution of said suit.

Said pleas in abatement further averred that the attempted service of process on them in said cause was made under chapter 89 of the Acts of 1859-60 of the General Assembly of Tennessee, and that such service was void because the statute authorizing this mode of service violates article 1, section 8, of the Constitution of the State of Tennessee, which provides:

"That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land."

That said statute is also violative of section 1, article 14, of the Amendments to the Constitution of the United States, which provides:

Knox Bros. v. Wagner & Co.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

These pleas in abatement were demurred to by the plaintiffs in error, and the case coming on to be heard before the circuit judge upon said pleas in abatement and demurrers, the demurrers were overruled, and plaintiffs in error electing to stand on their demurrers, and refusing to plead further to said pleas in abatement, a judgment was entered dismissing their suit. From this judgment they have appealed to this court, and have assigned the action of the circuit judge for error.

It is a well-established rule of practice in this State that, when the sufficiency of a pleading is tested by demurrer, the averments of the pleading must be taken as true. It must be, therefore, held, in accordance with the averments contained in said pleas in abatement, that E. W. Wagner & Co. is not a corporation, but is a partnership, composed of E. W. Wagner and Ernest Tietgens, and was such at the time the process was issued and served upon T. M. Pritchett, their local manager in Davidson county; further, that E. W. Wagner and Ernest Tietgens, at the time of the issuance of the summons, and at the time of its service, were non-residents of the State of Tennessee, and residents of the State of Illinois; that service of said summons was not had upon either E. W. Wagner or Ernest Tietgens, but alone upon T. M. Pritchett, their agent or local manager in Davidson county.

Knox Bros. v. Wagner & Co.

It is insisted by the plaintiffs in error that service of process upon T. M. Pritchett, the local manager of defendants in error, was binding upon them, and gave the court jurisdiction of their persons, for the purposes of said suit, under chapter 89 of the Acts of 1859-60 (Thompson's-Shannon's Code, section 4542). This statute reads as follows:

"When a corporation, company, or individual has an office or agency, or resident director, in any county other than that in which the chief officer or principal resides, the service of process may be made on any agent or clerk employed therein in all actions brought in such county against said company growing out of the business of, or connected with, said company or principal's business; but this section shall apply only to cases where the suit is brought in such counties in which such agency, resident director, or office is located."

It is insisted by defendants in error that this statute, in so far as it applies to nonresident individuals, violates the federal Constitution as to due process of law.

In *Flexner v. Farson et al.*, 268 Ill., 435, 109 N. E., 327, Ann. Cas., 1916D, 810, the court, in passing on the validity of a similar statute passed by the legislature of the State of Kentucky said:

"The several States of the Union are not in every sense independent, as many of the rights and powers which originally belonged to them are now vested in the federal government under the Constitution, but they possess and exercise the authority of independent States, except in so far as limited by that Constitution. Every State possesses exclusive jurisdiction and sov-

Knox Bros. v. Wagner & Co.

ereignty over persons and property within its territory, but no State can exercise direct jurisdiction and authority over persons and property without its territory. To render the jurisdiction of any State court effectual in any case it is necessary that the thing in controversy or the parties interested be subjected to the process of the court. 'Certain cases are said to proceed *in rem* because they take notice rather of the thing in controversy than of the persons concerned, and the process is served upon that which is the object of the suit without specially noticing the interested parties, while in other cases the parties themselves are brought before the court by process. . . . Where a party has property in a State and resides elsewhere, his property is justly subject to all valid claims that may exist against him there; but beyond this, due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered' "—citing Cooley's Const. Lim. (6th Ed.), 496, 499; 2 Black on Judgments, section 906; 2 Freeman on Judgments (4th Ed.), sections 564-567; *Louisville, etc., R. Co. v. Nash*, 118 Ala., 477, 23 South., 825, 41 L. R. A., 331, 72 Am. St. Rep., 181; *Weaver v. Boggs*, 38 Md., 255; *Brooks v. Dun* (C. C.), 51 Fed., 138.

The Kentucky statute involved in that suit was section 51 of the Civil Code of that state, and reads as follows:

"In actions against an individual residing in another State, or a partnership, association, or joint-stock company, the members of which reside in another State, engaged in business in this State, the summons may be served on the manager, or agent of, or person in

Knox Bros. v. Wagner & Co.

charge of, such business in this State, . . . in the county where the cause of action occurred."

The action was one of debt brought by Flexner in the circuit court of Cook county, Ill., on a judgment rendered by the circuit court of Jefferson county, Ky., again Farson, Son & Co., and in favor of Flexner. Service was had upon William Farson only; the other members of the partnership not being found.

In the original suit brought in the Kentucky court the service of process upon William Farson was had by serving it upon the alleged agent of Farson, Son & Co., Washington Flexner; William Farson, Son & Co. being nonresidents of the State. The Illinois court held that the Kentucky statute was invalid, because violative of the federal Constitution as to due process of law, and its decision was affirmed by the supreme court of the United States in a written opinion delivered by Mr. Justice HOLMES on January 7, 1919, 248 U. S.—39 Sup. Ct., 97, 63 L. Ed.—.

To the same effect are the holdings of the courts in the cases of *Moredock v. Kirby* (C. C.), 118 Fed., 180; *Aikmann v. Sanderson*, 122 La., 265, 47 South., 600; *Coughlin v. Pinkerton*, 41 Wash., 500, 84 Pac., 14.

The same principle was announced in the celebrated case of *Pennoyer v. Neff*, 95 U. S., 714, 24 L. Ed., 565. In that case it was held that a personal judgment was without validity if it were rendered by a State court against a nonresident of a State who was served by publication, and no personal service in the State was made, and he did not appear; that a State, having within its territory the property of a nonresident, may hold it to satisfy claims of its citizens against him; that its tribunals may inquire into its obligations to

Knox Bros. v. Wagner & Co.

the extent necessary to control the disposition of that property, but, if he has no property in the State, there is nothing upon which its tribunals can adjudicate. It was further held in that case that substituted service by publication, or in other authorized form, is sufficient to inform a nonresident of the object of the proceedings taken, where property is once brought under the control of the court by seizure or some equivalent act, but where suit is brought to determine the rights and obligations of the person—that is, where the suit is merely *in personam*—such constructive service is ineffectual for any purpose.

It is not insisted that any property of the defendants in error was attached or brought before the court in the suit at bar. The plaintiffs in error merely sought a personal judgment against them.

The cases of *Toppins v. Railroad*, 5 Lea, 600, and *Railroad v. Walker*, 9 Lea, 481, which are relied on by counsel for plaintiffs in error, have no application to the case at bar. Those cases relate to corporations which occupy a different *status* from that of nonresident individuals. When a foreign corporation enters the *State* for the purpose of doing business, it becomes subject to the laws of the State regulating such corporations, and the State may, through its proper representatives, enact a statute authorizing the services of process on its resident officers or agents in any suit which may be brought against it.

In the case of *Green v. Snyder*, reported in 114 Tenn., 100, 84 S. W., 808, which is cited by plaintiffs in error in support of their contention that the Act of 1859-60 is valid, and authorized the service of process upon the agent of defendants in error, the constitution-

Knox Bros. v. Wagner & Co.

ality of said statute does not seem to have been raised on the hearing, but was raised upon a petition to rehear in the supreme court, which petition was overruled. We think the overruling of the petition was, perhaps, due to the peculiar state of the pleadings in that case; but, however this may be, we feel that the holding of the supreme court of the United States in *Flexner v. Farson et al.*, *supra*, is controlling.

The judgment of the court below is affirmed, with costs.

Morton v. State.

MR & MRS. C. E. MORTON *et ux.* v. THE STATE.*

(Nashville. December Term, 1918.)

1. HUSBAND AND WIFE. Criminal responsibility of wife.

At common law, a married woman was not responsible for crimes committed in the presence of her husband, except murder and treason; but for crimes committed out of her husband's presence, she was as responsible as if single. (*Post*, p. 359.)

Acts cited and construed: Acts 1917, ch. 12.

Cases cited and approved: *Shacklett v. Polk*, 51 Tenn., 105; *Lowry v. Naff*, 44 Tenn., 370; *State v. Cleaves*, 59 Me., 298; *Mulvey v. State*, 43 Ala., 316.

2. HUSBAND AND WIFE. Commission of crime by wife. Presumption of duress by husband. Rebuttal.

Common-law presumption that wife acted under duress of her husband in committing crime, except murder or treason, was weak, and might be rebutted by very slight circumstances. (*Post*, pp. 359-360.)

Cases cited and approved: *State v. Cleaves*, 59 Me., 298; *People v. Wright*, 38 Mich., 744.

3. HUSBAND AND WIFE. Married Woman's Act. Emancipation.
Under the Married Woman's Act of 1913, married women are no longer under a disability of coverture, but are completely emancipated. (*Post*, p. 360.)

Acts cited and construed: Acts 1913, ch. 26.

Cases cited and approved: *Gill v. McKinney*, 140 Tenn., 559.

4. HUSBAND AND WIFE. Commission of crime by wife. Duress of husband. Married Woman's Act.

In view of the Married Woman's Act of 1913, there is no longer any presumption that the wife in committing crime acts under the duress of the husband. (*Post*, p. 360.)

*On effect of married women's acts upon husband's liability for torts of wife, see notes in 30 L. R. A., 521, 14 L. R. A. (N. S.), 1003, 25 L. R. A. (N.S.), 840 and L. R. A., 1915A, 491.

Morton v. State.

5. **HUSBAND AND WIFE.** Commission of crime by wife. Duress of husband. Rebuttal of presumption.

Where husband and wife were arrested for bringing six or eight sacks of whiskey, containing twenty quarts each, into the State in an automobile, the facts were sufficient to rebut any presumption, if it existed, that wife was acting under husband's duress. (*Post*, pp. 360, 361.)

FROM DAVIDSON

Appeal from the Criminal Court of Davidson County.
—HON. J. D. B. De Bow, Judge.

PAUL W. HOGGINS and JOHN HILDROP, for Morton and wife.

CHARLES L. CORNELIUS, Assistant Attorney-General, for the State.

MR. CHIEF JUSTICE LANSDEN delivered the opinion of the Court.

The plaintiffs in error, who are man and wife, were indicted and convicted in the criminal court of Davidson county for violating the so-called Bone Dry Law. (Acts 1917, chapter 12).

In February, 1918, information came to the police officers of Nashville, Tenn., that an automobile load of whiskey was en route from Hopkinsville, Ky., to Nashville. Police officers stationed themselves on the Hopkinsville road near Goodlettsville, in Davidson county, and blockaded the road and arrested plaintiffs in error. They searched the automobile and found "six or eight" sacks in the automobile, each containing about twenty quarts of whiskey.

Morton v. State.

The contention is made for Mrs. Morton that the proof fails to show that she had any knowledge of, or interest in, the whiskey, and all that is shown is that she was riding in an automobile with her husband. It is said that she was under the legal duress of her husband, and although he is guilty, she is not, because her presence in the automobile will be attributed by the law to the duress of the husband. Many cases are cited in the brief of learned counsel for this proposition, but in the view which we take of the case it is not necessary to review them all. *Shacklett v. Polk*, 4 Heisk., 105; *Lowry v. Naff*, 4 Cold., 370.

Counsel cites the above cases together with many more, which hold in substance that the legal identity of the wife is merged in that of the husband at common law. The cases cited deal with estates of married women, and contain the general statement to the foregoing effect.

It was also the rule at common law that a married woman was not responsible for crimes committed in the presence of her husband, except murder and treason. However, for crimes committed out of the presence of the husband she was as capable of and as responsible for as if she were single. If she committed a crime in the presence of her husband, excepting murder and treason, it was presumed that she did so under constraint by him, and she was therefore excused, and he was presumably guilty. *State v. Cleaves*, 59 Me., 298, 8 Am. Rep., 422; *Mulvey v. State*, 43 Ala., 316, 94 Am. Dec., 684.

However, the presumption that she acted under the duress of her husband was small, and it might be rebutted by very slight circumstances. *State v. Cleaves*,

Morton v. State.

supra; *People v. Wright*, 38 Mich., 744, 31 Am. Rep., 331.

This supposed duress of the wife by the fact of marriage, like all other doctrines built upon the legal identity of husband and wife, must depend upon the disability of the wife by virtue of marriage. By our Married Woman's Act of 1913 (Acts 1913, chapter 26), the policy of this State was completely changed, so that married women are no longer under the disability of coverture, and are completely emancipated. *Gill v. McKinney*, 140 Tenn., 559, 205 S. W., 416.

The case cited declares that it was the intention of the legislature to completely emancipate married women, except where such emancipation either is not permitted by a proper construction of the act, or the court is forbidden by sound public policy to attribute such an intention to the legislature. The public policy of the State with respect to the disability of the wife, because of the fact of marriage, is declared by the act referred to, and common law is completely abrogated. See, also, 8 R. C. L., p. 65; 12 Cyc., p. 161.

If the presumption existed in this State that the wife was acting under the duress of her husband, it would be rebutted by the facts of this case. The evidence required for such rebuttal is very slighting to show the size of the automobile employed by the Mortons, but it is shown that it contained "six or eight" sacks of whiskey, containing twenty quarts each. The automobile with the whiskey was apprehended by some means not disclosed, and the police officers at Nashville were notified that it was moving from Hopkinsville to Nashville, loaded with whiskey. We think Mrs. Morton must have known of the presence of the whiskey in

Morton v. State.

the automobile, and her guilty knowledge is not attributable to anything other than the quantity of whiskey. She did not testify in the case, and there is nothing to indicate that she was not a participant in the offense of her husband. She rests her case exclusively upon the legal presumption that she was acting under the presumed duress from her husband. We hold this is not sufficient. The case is therefore affirmed.

Rugg v. The State.

E. W. RUGG v. THE STATE.

(Nashville. December Term, 1918.)

1. INDICTMENT AND INFORMATION. Misdemeanors. Description of offense.

In Indictment for misdemeanors, a substantial description of the offense is required to reasonably identify the offense for which the defendant is being prosecuted. (*Post*, pp. 367, 368.)

Acts cited and construed: Acts 1913, ch. 35.

Cases cited and approved: Bilbro v. State, 26 Tenn., 534; State v. Pennington, 40 Tenn., 119.

Case cited and distinguished: State v. Woodson, 24 Tenn., 55.

2. WEIGHTS AND MEASURES. Criminal prosecution. Sufficiency of indictment.

Indictment for selling, offering, and exposing for sale a commodity by measure numerically less than the quantity represented, in violation of Pub. Acts 1913 (1st Ex. Sess.) chapter 35, not stating the names of the person or persons to whom the alleged sales or offers to sell were made, held insufficient. (*Post*, pp. 368, 369.)

Code cited and construed: Sec. 6734 (T.-S.).

3. ELECTRICITY. Use of false meter. Sufficiency of indictment.

An indictment for using false meter in supplying town with electrical current in violation of Thompson's Shannon's Code, section 6734, which fails to state that such use was with intent to defraud, is insufficient; such intent being the gravamen of the offense. (*Post*, pp. 369, 370.)

Cases cited and approved: Harrison v. State, 42 Tenn., 234; State v. Ladd, 32 Tenn., 226; Morrow v. State, 29 Tenn., 120; Whiteside v. State, 44 Tenn., 182.

4. ELECTRICITY. Interference with testing of meter. Sufficiency of indictment.

Indictment charging interference by defendant with the sealing and testing of electric meters by deputy and assistant state sealer of

Rugg v. The State.

weights and measures, in violation of Pub. Acts 1913 (1st Ex. Sess.), chapter 49, section 9, held sufficient without stating the location of the meters alleged to have been changed or tampered with by defendant and the manner in which they had been changed or tampered with. (*Post*, pp. 370, 371.)

5. **ELECTRICITY.** Tampering with meter. Criminal prosecution. Sufficiency of evidence.

In a prosecution for tampering with or changing electric meters before they could be tested by assistant state sealer of weights and measures, in violation of Pub. Acts 1913 (1st Ex. Sess.), chapter 46, section 9, evidence of the assistant sealer and superintendent of weights and measures that the meters had been tampered with or changed by defendant before they could be tested, where such facts were not of his own knowledge, but merely from information, was insufficient to sustain conviction. (*Post*, pp. 371, 372.)

FROM TROUSDALE.

Appeal from the Criminal Court of Trousdale County.
—Hon. J. N. FISHER, Special Judge.

WILLARD N. SMITH, for appellant.

CHARLES L. CORNELIUS, Assistant Attorney-General,
for the State.

MR. JUSTICE HALL delivered the opinion of the Court.

The defendant below, E. W. Rugg, was indicted in the circuit court of Trousdale county at its March term, 1918, the indictment containing three counts. The first count is as follows:

“The grand jurors for the State of Tennessee upon their oaths present that E. W. Rugg heretofore, on the

Rugg v. The State.

1st day of March, 1918, in the State an county aforesaid, did unlawfully sell and offer and expose for sale a commodity, viz., electric current for lighting and other purposes, which was by measure and numerical count less than the quantity he represented the same to be, against the peace and dignity of the State."

The second count reads as follows:

"And the grand jurors aforesaid upon their oaths aforesaid further present that E. W. Rugg, on the date aforesaid, and in the State and county, aforesaid, did unlawfully by himself and as servant and agent for another, to wit, as agent for Hartsville Light & Ice Company, a corporation supplying the town of Hartsville, Tenn., with electric current for lighting and other purposes use a false measure or measuring device commonly called a meter, used for measuring the amount of electric current furnished a consumer of same, in selling a commodity, viz., electric current used for lighting and other purposes in homes and shops in said town of Hartsville, Tenn., for hire and reward against the peace and dignity of the State of Tennessee."

The third count is in words as follows:

"And the grand jurors aforesaid upon their oath aforesaid further present that E. W. Rugg, on the date aforesaid, in the State and county aforesaid, did unlawfully hinder and obstruct and interfere with one D. J. Frazier, a deputy and assistant State sealer of weights and measures, while in the performance of his official duties, viz.: The said D. J. Frazier, being engaged in sealing and testing meters used by householders and shopkeepers in the town of Hartsville, Tenn., for measuring electric current being furnished in said town by

Rugg v. The State.

the Hartsville Light & Ice Company, notified said Rugg that he was so engaged in said work and to refrain from changing or in any way tampering with any meters in the said town until the said work was complete in order that the said meters might be tested as to whether the same had been registering correctly the amount of current being consumed, when the said Rugg, knowing that said official was so engaged in the discharge of his said official duties, and in order to hinder, interfere with, and obstruct said official in same, tampered with and changed divers and numerous meters in said town before said official could test and inspect same, against the peace and dignity of the State."

The defendant made a motion to quash each of the counts of said indictment. The motion sought to quash the first count because it failed to designate or aver the names of the person or persons to whom the sale or sales, or offers of sale, of electric current, which was, by measure, less than the quantity he represented the same to be.

The motion challenged the sufficiency of the second count upon the ground that it failed to aver that the defendant knowingly, and with the intent to defraud, used a false measure or measuring device for measuring the quantity of electric current sold by him.

The motion challenged the sufficiency of the third count, because it failed to specify the meters alleged to have been changed or tampered with by the defendant, or their location, and also failed to aver in what manner or how said meters were tampered with and changed.

The motion to quash was overruled by the trial judge. Whereupon the defendant demurred to said indictment, assigning five grounds, all presenting the same question,

Rugg v. The State.

however, and that is: Does the statute upon which the first count is predicated apply to the sale, or exposing to sale, of electric current as a commodity measured by a device known as a meter?

The trial court was of the opinion that it did, and overruled the demurrer. Thereupon the defendant pleaded not guilty to said indictment, and was tried before a jury at the August term of said court, 1918, when a verdict was returned finding him guilty upon each of the counts of the indictment. His motion for a new trial having been overruled, he has appealed to this court, and has assigned errors.

The first assignment of error relates to the ground of the motion to quash the first count of the indictment. It is insisted by the defendant that this count should have been quashed, because the indictment fails to aver the names of the person or persons to whom the alleged sale or sales, or the offers to sell, were made; it being insisted that this averment was essential to a proper description of the offense, and to give the defendant reasonable notice of the offense which he was cal'ed on to defend himself, and to enable him to properly make his defense.

The first count of said indictment is predicated upon chapter 35 of the Public Acts of the General Assembly of 1913 (1st Ex. Sess.) which is an act to prevent frauds in the weight, measure, or numerical count of articles sold or offered for sale in the State, and making the violation of said act a misdemeanor. The first section of said act reads as follows:

“Section 1. Be it enacted by the General Assembly of the State of Tennessee, that any person who, by himself or by his servant or agent, shall sell, offer, or ex-

Rugg v. The State.

pose for sale, any quantity of any commodity which is by weight, measure, or numerical count less than the quantity which he represents same to be, shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than \$10 nor more than \$50 for the first offense, and for subsequent offenses not less than \$50 nor more than \$100, or shall be imprisoned in the county jail not more than ninety days, or both such fine and imprisonment: Provided, that the state superintendent of weights and measures and the state sealer of weights and measures shall jointly fix and determine reasonable variations for all classes of commodities; and no penalties for violation of this act shall be imposed when the variation in weight, measure, or numerical count does not exceed the reasonable variation so fixed: Provided, further, that the said state superintendent and state sealer shall give the reasonable variations so established all possible publicity through the public press and through bulletins of their offices."

Section 2 reads:

"Sec. 2. Be it further enacted, that the grand juries of the several counties of the State shall have inquisitorial power over said offenses, and the judges of the several criminal courts and circuit courts having criminal jurisdiction shall especially charge this law to the grand juries of the several counties of the State."

In indictments for misdemeanors a substantial description of the offense is required to reasonably identify the offense for which the defendant is being prosecuted. This is necessary in order that he may know whereof he is accused and may prepare his defense, and in the event of a subsequent prosecution that it may be made to appear whether he is being prosecuted twice

Rugg v. The State.

for the same offense. *Bilbro v. State*, 7 Humph., 534; *State v. Pennington*, 3 Head, 119; *State v. Woodson*, 5 Humph., 55.

In the case of *State v. Woodson*, last cited above, the defendant was indicted for keeping "certain false weights for weighing iron, goods, wares, and merchandise by him sold in the way of his trade." The indictment charged:

That the defendant, "well knowing said weights to be false, did willfully, falsely, and fraudulently sell to divers persons iron, goods, wares, and merchandise which, by reason of having been weighed with said false weights, were very much deficient and short of the true and just weight."

To this indictment the defendant demurred, which demurrer was sustained by the trial court. The State appealed, and this court, speaking through Judge GREEN, said:

"The indictment in this case does not charge that the goods were sold to any particular person, but states that they were sold to 'divers persons.' This we think too vague and indefinite in a criminal charge. The party ought to be notified by the indictment of the transaction in relation to which he is called on to defend himself."

We think the first count of the indictment in the case under consideration is subject to the same criticism. It does not contain a sufficient description of the offense to enable the defendant to make his defense, and to protect him against a subsequent prosecution growing out of the same transaction. It results, therefore, that we think the motion to quash the first count was well grounded.

Rugg v. The State.

The second count of the indictment is predicated upon section 6734 of Thompson's-Shannon's Code, which reads as follows:

"If any person, with intent to defraud, have in his possession, or use, any false balance, weight, or measure in any business, trade, or transaction, it shall be a misdemeanor."

It is insisted by the defendant in his motion to quash that this count of the indictment is fatally defective, because it fails to aver that the false measuring device was used with the intent to defraud.

We think the words in the statute "with intent to defraud" are material, and constitute the gravamen of the offense, and that their averment was necessary to make said count valid.

In Wharton on Criminal P. & P., section 220, it is said:

"Where a statute prescribes or implies the form of the indictment, it is usually sufficient to describe the offense in the words of the statute, and for this purpose it is essential that these words should be used. In such cases the defendant must be specially brought within all of the material words of the statute, and nothing can be taken by intendment."

In Bishop's New Criminal Procedure, vol. 1, sec. 611, subsec. 2; sec. 612, subsecs. 1, 2, and 3, it is said:

"Where the offense is statutory, the indictment should follow the statute. To the extent that the statute defines the offense, not less is admissible. The indictment must charge the defendant with all of the acts within the statutory definition."

This same rule is announced in *Harrison v. State*, 2 Cold., 234; *State v. Ladd*, 2 Swan, 226; *Morrow v.*

Rugg v. The State.

State, 10 Humph., 120; *Whitesides v. State*, 4 Cold., 182.

It results, therefore, that we think the motion to quash the second count should have been sustained.

This brings us to a consideration of the third count. This count is predicated on the provisions of section 9 of chapter 46 of the Public Acts of 1913 (1st Ex. Sess.), providing a system of standard weights and measures in the State. Said section reads as follows:

"Be it further enacted, that any person who shall hinder, obstruct, or interfere in any way with the state superintendent, state sealer, any deputy or assistant state sealer, or any county or city sealer while in the performance of his official duties, or who shall fail to produce, upon demand by any authorized sealer or inspector of weights and measures, any weights, measures, balances, weighing devices, or measuring devices in or upon his premises, place of business, or in his possession for use in manufacture or trade, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a fine of not less than \$10 nor more than \$50, or to imprisonment for not more than ninety days, or to both such fine and imprisonment."

It was insisted that the third count was fatally defective, because it failed to state the location of the meters alleged to have been changed or tampered with by the defendant, and the manner in which they had been changed or tampered with.

We do not think the omissions complained of in the motion to quash said count rendered it fatally defective. To require the State to designate in the indictment the meters changed or tampered with, and their exact location, would, we think, be placing an unreasonable burden upon the State. It must be presumed that the defend-

Rugg v. The State.

ant knew the location of each meter under his supervision and control. The indictment averred that he tampered with and changed a number of them before D. J. Frazier, the assistant state sealer of weights and measures, could inspect and test them. We think this constituted reasonable notice to the defendant of the offense with which he was charged, and conveyed to him sufficient information to enable him to make his defense. It put him in a position to rebut the charge that any of said meters had been tampered with or changed. The gravamen of the offense prescribed by the statute is the interference "in any way with the state superintendent, state sealer, any deputy or assistant state sealer, or any county or city sealer while in the performance of his official duties." The indictment charged that the defendant did interfere with said officer by tampering with and changing a number of the meters under his supervision before the same could be inspected and tested by said officer. We think this was sufficient.

It is next insisted by the defendant that there is no evidence to support the verdict of the jury upon this count of the indictment.

We think this contention is well taken. The record fails to disclose any evidence tending to show that the defendant tampered with or changed any of the meters before they could be tested by the assistant state sealer of weights and measures. Mr. Frazier, the assistant sealer and superintendent of weights and measures, who testified on behalf of the State, did not undertake to state of his own knowledge that any of said meters had been tampered with or changed by the defendant before they could be tested. He only claimed to have information that such was the case. No witness was introduced

Rugg v. The State.

to show that the defendant had tampered with or changed any of said meters in advance of their being tested by the assistant sealer of weights and measures, or that said officer was in any other way hindered or interfered with in making of tests.

We are of the opinion that the trial judge committed error in not quashing the two first counts of the indictment, and that he committed further error in not granting the defendant a new trial on the third count of the indictment, because there was no evidence to support that count.

It results, therefore, that the judgment will be reversed, and the cause remanded.

Mengel Box Co. v. Stevens.

MENGEL Box COMPANY v. IKE B. STEVENS, Secretary of State.

(*Nashville. December Term, 1918.*)

1. **CONSTITUTIONAL LAW. Taxation. Additional privilege tax. Foreign corporation. Impairing obligation of contract.**
Acts 1900, chapter 504, requiring corporations, which had already entered State and paid for privilege of entering, to pay a privilege tax measured by their capitalization, and to pay difference between sum paid on entering State and amount required by statute, is constitutional. (*Post, pp. 375-377.*)

Acts cited and construed: Acts 1909, ch. 504.

Cases cited and approved: Cheney Bros. v. Massachusetts, 246 U. S., 147; Kansas City, M. & B. R. Co. v. Stiles, 242 U. S., 111; St. Louis Southwestern R. Co. v. Arkansas, 235 U. S., 350; Baltic Min. Co. v. Massachusetts, 231 U. S., 68.

2. **TAXATION. Foreign corporations. Privilege tax.**
Act 1909, chapter 504, requiring foreign corporations to pay a privilege tax measured by their capitalization, applied to corporations that had already entered the State; the substance of the privilege being doing of business in State. (*Post, p. 377.*)

3. **STATUTES. Construction. Interpretation by officials.**

While an interpretation of a statute long adopted by State officials will be highly favored by the court, it will not be followed if palpably wrong. (*Post, pp. 377, 378.*)

Code cited and construed: Sec. 720 (T.-S.).

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.
—Hon. Jno. ALLISON, Chancellor.

Mengel Box Co. v. Stevens.

FRANK M. THOMPSON, Attorney-General, for appellant.
RANDOLPH & RANDOLPH, for appellee.

MR. JUSTICE GREEN delivered the opinion of the Court.

This suit was brought by the complainant to recover from the secretary of State a balance of a privilege tax exacted by that official and paid under protest.

The complainant, on September 9, 1899, applied to the then secretary of State for admission to do business in Tennessee. The complainant was a corporation, organized under the laws of New Jersey, with a capital stock of \$1,000,000 on the date mentioned. Permission was granted to the complainant to enter into this State, and it complied with all the laws in force with respect to the admission of foreign corporations, and paid a privilege tax of \$100, which was required by the statute at that time of all foreign corporations. It is a manufacturing corporation and has acquired considerable property in this State.

By subsequent acts of the legislature, the privilege tax on foreign corporations was changed from a flat rate of \$100, and the privilege was graduated according to the capitalization of such corporations. The complainant has increased its capital stock several times, and by the last amendment to its charter was capitalized at \$6,000,000.

Each time the complainant has increased its capital stock, it has properly filed copy of its amended charter with the secretary of State and has paid an additional amount on account of its privilege tax by reason of such increase of its capital. The complainant and the several secretaries of State have, in every instance, agreed on

Mengel Box Co. v. Stevens.

the additional sum that was to be paid, except on the occasion of the last amendment.

By chapter 504 of the Acts of 1909, the legislature, pursuing its later policy of assessment, enacted that the coming into this State of any foreign corporation for the purpose of doing business was declared to be a privilege, and that such foreign corporation should pay a tax measured by the amount of its capital stock. Corporations capitalized at \$5,000,000 and over were required to pay \$1,500.

The complainant and the present secretary of State were not able to agree on the amount of privilege tax for which the former was liable, under the last amendment to its charter increasing its capital stock to \$6,000,000, and, as above stated, the complainant paid in the amount claimed by the secretary of State to be due from it, under protest, and has brought this suit for its recovery.

While, in its previous dealings with the secretaries of State, the complainant has recognized its amenability to the State's change of method and rate of such privilege taxation, nevertheless it now presents the whole question of its liability for any privilege tax other than the \$100 originally paid by it. It is insisted for the complainant that, having paid the sum of \$100 for the privilege of entering into this State to do business, in 1899, which was the full tax then required, it became entitled to do business in Tennessee thereafter, without any further liability on this account. The chancellor took this view of the case, but in so doing we think he was in error.

This contention would be more plausible if the privilege was merely the entry into the State. That, how-

Mengel Box Co. v. Stevens.

ever, would be an idle and worthless thing. The substance of the privilege is the right of a foreign corporation to do business in Tennessee, in the language of the statute, the coming into the State "for the purpose of doing business here."

By the payment of the sum exacted of it in 1899, the complainant merely obtained license to do business in this State. The State was not cut off from imposing a higher license or from changing its method of privilege or excise taxation. This is what the State has done. In 1899 any foreign corporation could obtain a license to do business in Tennessee upon the payment of \$100 and complying with other requirements of the law. In 1909 the State required foreign corporations to pay a privilege tax measured by their capitalization. The State was entitled to do this, and for the privilege of doing business in Tennessee, since 1909, a foreign corporation capitalized at \$6,000,000 has been required to pay a tax of \$1,500.

The secretary of State gave to the complainant credit for all sums paid by it herein, and exacted only the difference between the aggregate paid and \$1,500. We think the complainant was clearly liable for this amount.

The supreme court of the United States has considered at length in several recent cases the taxation of foreign corporations by the several States, and we could add nothing to what has been said by that court in its various opinions. The last of these cases is *Cheney Bros. v. Massachusetts*, 246 U. S., 147, 38 Sup. Ct., 295, 62 L. Ed., 632.

The opinion of the court therein fully sustains what we have previously said. See, also, *Kansas City, M. & B. R. Co. v. Stiles*, 242 U. S., 111, 37 Sup. Ct., 58, 61 L.

Mengel Box Co, v. Stevens.

Ed., 176; *St. Louis Southwestern R. Co., v. Arkansas*, 235 U. S., 350, 35 Sup. Ct., 99, 59 L. Ed., 265; *Baltic Min. Co. v. Massachusetts*, 231 U. S., 68, 34 Sup. Ct., 15, 58 L. Ed., 127.

In reply to complainant's argument that the act of 1909 is prospective and did not relate to corporations that had already entered into the State, we repeat that the substance of the privilege here is the doing of business in the State. A foreign corporation, previously admitted, that continued to do business in the State subsequent to 1909, became liable to the tax prescribed in the Revenue Act of that year, just as a foreign corporation that entered the State after the act was passed. In either case, the exercise of the privilege—the doing of business—was after and under the statute.

As heretofore stated, the complainant has recognized the validity of the graduated privilege tax ever since it was adopted in Tennessee and has paid an additional sum on the occasion of each increase of its capital. Former secretaries of State adopted a construction of our revenue statutes, and a method of computation of the amounts due from complainant upon the various amendments to its charter, which, if now followed, would result in a smaller liability than the sum required of complainant by the present secretary of State, when its capital stock was last increased. It is not necessary to go into these former computations. They were somewhat complicated and certainly erroneous. It is urged that we should give heed to this interpretation of our revenue statutes by the officers charged with their enforcement. The construction of our statutes for which complainant contends had not been followed by the secretaries of State long enough to make a precedent,

Mengel Box Co. v. Stevens.

and, as we have seen, was disregarded by the present incumbent of that office. Moreover, while an interpretation of such a statute long adopted by such officials would be highly favored by the court, it would not be followed if palpably wrong.

The case before us is just this. By the act of 1909, all foreign corporations with a capital stock of \$5,000,000 and over are required to pay \$1,500 for the privilege of doing business in Tennessee. This is not an annual tax, nor is the privilege limited to any period of time. It endures until legally revoked. The tax applies to all foreign corporations so capitalized. If such a corporation has only paid a portion of the tax, it must pay the remainder. It can only exercise the privilege after the payment of \$1,500.

There is no question of interstate commerce, nor of due process of law, herein that has not been ruled favorably to the contentions of the State by the decisions of the supreme court, hereinbefore cited. Domestic corporations are required to pay an additional tax upon each increase of their capital stock. Thompson's-Shannon's Code, section 720.

Without further elaboration, we reverse the decree of the chancellor, and dismiss this bill, with costs.

Gill v. State.

CHARLES H. GILL v. THE STATE.

(Nashville. December Term, 1918.)

1. CRIMINAL LAW. Jurisdiction. United State property.

Where land is ceded to or purchased by the United States with the consent of the State under Constitution U. S., article 1, section 8, subsection 17, the federal courts have jurisdiction of the prosecution for a crime committed thereon to the exclusion of the State courts. (*Post*, pp. 383-385.)

Cases cited and approved: *State v. Tully*, 31 Mont., 365; *State v. Mack*, 23 Nev., 359; *Baker v. State*, 47 Tex. Cr., 482; ⁽¹¹⁰⁾ *State v. Kelly*, 76 Me., 331; *In re O'Connor*, 37 Wis., 379.

Constitution cited and construed: Art. 1, sec. 8, subsec. 17.

2. CRIMINAL LAW. Jurisdiction. United States property. Constitutionality of statute.

A State statute conferring jurisdiction on the State courts for the prosecution of a crime committed upon property ceded to or purchased by the United States government with the consent of the State under Constitution U. S., article 1, section 8, subsection 17, is unconstitutional and void. (*Post*, pp. 383-385.)

3. UNITED STATES. Authority over property purchased from State. Ownership of soil.

Where the United States purchases land without the consent of the State in which the land is situated, the mere ownership of the soil does not give the United States paramount authority over such land. (*Post*, pp. 383-385.)

4. CRIMINAL LAW. Jurisdiction. United States property. Compliance with statute.

Where map of land purchased by United States had been taken to office of judge of county for purpose of closing road, and was not filed in county court clerk's office as required by Acts 1895, chapter 110, section 1, to show State's consent to acquisition of such property by the United States, jurisdiction of offense committed

Gill v. State.

on such land remains in State courts; there having been no consent to purchase by United States, as required by Constitution U. S., article 1, section 8, subsection 17. (*Post, pp. 385, 386.*)

Acts cited and construed: Acts 1895, ch. 110, sec. 1.

FROM DAVIDSON.

Appeal from the Criminal Court of Davidson County.
—HON. J. D. B. DE Bow, Judge.

R. L. SADLER, for appellant.

FRANK M. THOMPSON, Attorney-General, and THOS. J. TYNE, for the State.

MR. JUSTICE HALL delivered the opinion of the Court.

The defendant below (plaintiff in error here), Charles H. Gill, was convicted in the criminal court of Davidson county of the offense of petit larceny, and was sentenced to sixty days in the county workhouse. He made a motion for a new trial, which was overruled, and he has appealed to this court and has assigned errors.

Before the case was called for trial in the court below the defendant filed a plea in abatement to the jurisdiction of the court as follows:

“Comes defendant in person and for plea says that the venue of the crime with which he is charged is on the territory of the United States of America commonly known as the powder plant, and that said territory or property is within the exclusive jurisdiction of the courts of the United States within the meaning of sec-

Gill v. State.

tions 82, 83, and 90 of Shannon's Code of Tennessee, and not within the jurisdiction of the criminal court of Davidson county, Tenn., it being used for public purposes."

This plea was sworn to by the defendant as required by law. The State joined issue on said plea, and in lieu of evidence a stipulation containing the following facts was entered into by the Attorney-General for the State and counsel for the defendant, and presented to the court:

"In this case, on the issues by the indictment, and the plea in abatement thereto, it is stipulated as follows:

"That the crime with which this defendant is charged was committed on territory purchased by the United States of America on which has been erected a munition plant known as the Old Hickory powder plant in Hadleys Bend, Davidson county, Tenn.

"This land comprises numerous tracts purchased from various individuals who separately conveyed their respective tracts to the United States of America on or about January, 1918, and that about the time of said purchase, or shortly thereafter, the Todd Bond & Mortgage Company, who prepared the abstracts for the owners of this land, prepared a map or plat showing the various tracts, which map or plat is attached hereto as Exhibit A to this stipulation.

"This map or plat was found about two months ago on a shelf in the office of the county judge of Davidson county, it having been taken to this office for the purpose of asking the proper county authorities to formally close a public road, the road to be closed being particularly marked on the said map. This road was closed, and the map was not intended to serve any further pur-

Gill v. State.

pose. That this map was not marked filed by the county court clerk or any one else. That it was not filed, or intended to be filed as a compliance with chapter 110, Acts of Tennessee 1895, or any other provision or condition of law precedent to the surrender of the jurisdiction of the State of Tennessee and its sovereignty over said lands in the United States of America. That it was not placed, or filed, by any one authorized by the United States of America for the purpose of complying with said statute or the laws of the State of Tennessee. That there has been no authority or act of the government of the United States of America showing any purpose or intention of assuming jurisdiction over the land in question. On the contrary, the United States of America has continually recognized and now recognizes, the complete sovereignty and jurisdiction of the State of Tennessee over said land.

"It is also agreed that one or more tracts shown on said plat have never been conveyed to the United States government; therefore the said plat does not accurately describe the lands purchased by the United States of America."

The trial judge overruled the plea in abatement. Thereupon the defendant entered a plea of guilty to the charge of petit larceny, for which he was sentenced to sixty days in the county workhouse, as before stated.

The sole question presented by the assignments of error is: Did the criminal court of Davidson county have jurisdiction over the offense committed by the defendant, or was the jurisdiction exclusively in the federal court?

Article 1, section 8, subsec. 17, of the Constitution of the United States provides that the Congress shall have

Gill v. State.

power to "exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square), as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

The rule is well settled that, if a crime is committed within the boundaries of such lands so ceded or purchased by the United States with the consent of the State, the federal courts have jurisdiction of a prosecution therefor to the exclusion of the State courts. 8 R. C. L., section 65; *State v. Tully*, 31 Mont., 365, 78 Pac., 760, 3 Ann. Cas., 824, and note; *State v. Mack*, 23 Nev., 359, 47 Pac., 763, 62 Am. St. Rep., 811; *Baker v. State*, 47 Tex. Cr., 482, 38 S. W., 1122, 122 Am. St. Rep., 703, 11 Ann. Cas., 751. Hence any statute of a State that attempts to confer its jurisdiction of such territory must necessarily be unconstitutional and void. *State v. Kelly*, 76 Me., 331, 49 Am. Rep., 620. But the United States, as a mere proprietor of land which is situated within the limits of a State and which was acquired by purchase without the consent of the legislature, has no paramount authority derived from ownership of the soil. 8 R. C. L., section 65; *In re O'Connor*, 37 Wis., 379, 19 Am. Rep., 765.

It appears from the stipulation of counsel that the crime with which the defendant was charged was committed on territory purchased by the United States of America on which has been erected a munition plant known as the Old Hickory powder plant in Hadleys

Gill v. State.

Bend, Davidson county, Tenn. This territory is comprised of numerous tracts from various individuals who separately conveyed their respective tracts to the United States of America on or about January, 1918. It is further stipulated that there has been "no authority or act of the government of the United States of America showing any purpose or intention of assuming jurisdiction over the land in question. On the contrary, the United States of America has continually recognized, and now recognizes, the complete sovereignty and jurisdiction of the State of Tennessee over said land."

By section 1 of chapter 110 of the Public Acts of the General Assembly of 1895 it is provided as follows:

"That pursuant to article (1) one, section eight, clause seventeen, of the Constitution of the United States, consent to purchase is hereby given, and exclusive jurisdiction ceded to the United States, over and with respect to any lands within the limits of this State, which shall be acquired by the United States for any of the purposes described in said clause of the Constitution of the United States; said jurisdiction to continue as long as the said lands are held and occupied by the United States, for public purposes, reserving, however, to this State, a concurrent jurisdiction for the execution upon said lands of all process, civil or criminal, lawfully issued by the courts of the State, and not incompatible with the cession; Provided, that an accurate map or plan, and description by metes and bounds of said lands shall be filed in the county court clerk's office of the county in which the same are situated; and provided, that the State reserves the right to tax all property of any railroad, or other corporation, having a right of way, or location over or upon the said lands."

Gill v. State.

In *State v. Tully*, supra, it was held that, where a State cedes to the United States lands for forts, etc., reserving concurrent jurisdiction to serve State process, civil and criminal, in the ceded place, such reservation merely operates as a condition of the grant, and does not defeat the exclusive jurisdiction of the United States over such place, and the State courts have no jurisdiction of the crimes committed. But, unless Congress takes jurisdiction of territory thus ceded or purchased, by exercising its exclusive right of legislation over the place, the jurisdiction of the State to support and maintain its laws and to punish crimes committed within its acknowledged jurisdiction and limits may be asserted and maintained. 8 R. C. L., section 65.

We think that, in order for the United States to acquire exclusive jurisdiction over the territory in question, the proviso in the cession act of 1895 must be complied with; that is, an accurate map or plat, and description by metes and bounds of said lands, shall be filed in the county court clerk's office of the county in which the same are situated. This was not done. The stipulation shows that a map or plat showing the various tracts of land composing said territory had been made, and was taken by some one, the stipulation does not disclose when or by whom, to the office of the county judge of Davidson county for the purpose of asking the proper authority to formally close a public road, the road to be closed being particularly marked on said map; that the map was not intended to serve any further purpose, and was not marked filed by the county court clerk, nor was it intended to be filed as a compliance with chapter 110 of the Acts of 1895.

Gill v. State.

It is insisted by counsel for the defendant that the act of 1895 is invalid, but he states no valid reason why it is invalid. It is next insisted that, if the act is valid, then the provision with reference to filing an accurate map or plan, and a description of said lands by metes and bounds in the county court clerk's office of the county in which the same are situated, is merely directory.

We do not think so. We see no reason why the State, through its lawmaking body, would not have the right to prescribe this as a condition precedent to the vesting of exclusive jurisdiction in the United States of lands purchased by them for public uses. The condition is reasonable, and is demanded by every consideration of public policy. Without such map, properly verified and filed, it would be difficult to establish the venue in many cases. The filing of such map or plan, together with a description of the lands purchased, is vitally important, in that the public may know where the State's jurisdiction ends and the federal jurisdiction commences.

It seems that the federal government has given this construction to the act of 1895; for it is stipulated that it has taken no action showing a purpose or intention of assuming jurisdiction over the territory in question. On the contrary, it has continually recognized, and now recognizes, the complete sovereignty and jurisdiction of the State over the same.

We are of the opinion that there is no error in the judgment, and it will be affirmed.

Dickens v. Bransford Realty Co.

B. T. DICKENS *et al.* v. BRANSFORD REALTY CO.

(Nashville. December Term, 1918.)

1. GARNISHMENT. Property subject to. Salary of railroad employee.

The salary of an employee of a railroad corporation being operated by the United States government under Act. Cong. March 21, 1918 (U. S. Comp. St. 1918, sections 3115 $\frac{3}{4}$ a-3115 $\frac{3}{4}$ p), is not subject to garnishment. (*Post*, pp. 388-390.)

Cases cited and approved: *Moore v. Mayor, etc.*, Chattanooga, 55 Tenn., 850; *Board of Directors v. Bodkin Bros.*, 108 Tenn., 700; *Baird v. Rogers*, 95 Tenn., 492.

Cases cited and distinguished: *Bank of Tennessee v. Dibrell*, 35 Tenn., 379; *City of Memphis v. Laski*, 56 Tenn., 511.

2. RAILROADS. Governmental agencies.

Under Act Cong. March 21, 1918 (U. S. Comp. St. 1918, sections 3115 $\frac{3}{4}$ a-3115 $\frac{3}{4}$ p), and under previous statutes and a proclamation of the President, the railroads of the country are merely agencies or instrumentalities of the United States government. (*Post*, pp. 390, 391.)

3. GARNISHMENT. Municipalities. Governmental Agencies.

It is the settled policy of the state to hold immune from garnishment all municipalities and other governmental agencies. (*Post*, p. 391.)

FROM DIVIDSON.

Appeal from the Circuit Court of Davidson County. to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—Hon. HARRY A LUCK, Special Judge.

KEEBLE & SEAY and A. W. STOCKELL, for plaintiff.

W. E. NORVELL, JR., for defendants.

Dickens v. Bransford Realty Co.

MR. JUSTICE GREEN delivered the opinion of the Court.

This suit was brought by the Bransford Realty Company, a creditor of B. T. Dickens, to subject the salary of the latter in the hands of his employer, Nashville Terminals, as garnishee, to the payment of the Realty Company's claim.

Nashville Terminals is a railroad corporation, handling the terminal business of the Nashville, Chattanooga & St. Louis Railway, and the Louisville & Nashville Railroad Company in Nashville, and said Terminals is and was at the time of this suit, being operated by the United States government.

The sole question presented is as to the liability of a railroad corporation operated by the government to be subjected to process of attachment and garnishment by a creditor of one of its employees.

The trial court held that such garnishment proceedings might be maintained, and rendered judgment accordingly. The court of civil appeals likewise reached this conclusion, but held that execution upon such judgment could not be issued while the defendant was being operated by the United States government.

Both parties have brought the case to this court by petitions for *certiorari*, complaining of the judgment of the court of civil appeals, in so far as adversely affected.

We are of opinion that garnishment proceedings cannot be maintained against such a defendant, under such circumstances, in this jurisdiction at least.

This court held long since that the comptroller of the State might not be garnished by a creditor of a State

Dickens v. Bransford Realty Co.

employee, to subject the salary of the latter. *Bank of Tennessee v. Dibrell*, 3 Sneed (35 Tenn.), 379.

Later it was declared that the same rule applied to garnishments against municipal corporations, arms, or agencies of the State, to subject the salaries of their employees. *City of Memphis v. Laski*, 9 Heisk. (56 Tenn.), 511, 24 Am. Rep., 327; *Baird v. Rogers*, 95 Tenn., 492, 32 S. W., 630.

In *Bank of Tennessee v. Dibrell*, supra, the court, speaking of such garnishments, said: "Every consideration of policy would forbid it. No government can sanction it. It would be very embarrassing generally, and, under some circumstances, might prove fatal to the public service, to allow the means of support of the servants of the government to be intercepted in the hands of distributing agents. If the funds of the government, thus specifically appropriated for the support and maintenance of its agents, were allowed to be divested by process of attachment, in favor of creditors, or otherwise, from their legitimate object, the functions of the government might be suspended."

In *City of Memphis v. Laski*, supra, quoting from the supreme court of Illinois, in *Merwin v. City of Chicago*, 45 Ill., 134, 92 Am. Dec., 204, it was said:

"The city should not be subjected to this species of litigation, no matter what may be the character of the indebtedness. If we hold it must answer in all these cases, and the exemption from liability to be allowed to depend in each case upon the character of the indebtedness, we shall leave it liable to a vast amount of litigation in which it has no interest, and obliged to spend the money of the people and the time of its officials in the

Dickens v. Bransford Realty Co.

management of matters wholly foreign to the object of its creation. A municipal corporation cannot be properly turned into an instrument or agency for the collection of private debts. It exists simply for the public welfare, and cannot be required to consume the time of its officers or the money in its treasury in defending suits in order that one private individual may the better collect a demand due from another."

The court has likewise held that the funds of a municipal corporation in the hands of a third person might not be subjected to garnishment by a creditor of the municipality. *Moore v. Mayor, etc., Chattanooga*, 8 Heisk. (55 Tenn.), 850; *Board of Directors v. Bodkin Bros.*, 108 Tenn., 700, 69 S. W., 270.

The principle seems to be that this court will not permit any obstruction of the financial administration of government. It will not permit any interference with the collection of its funds by a governmental agency nor with the disposition of such funds by a governmental agency.

The case of *Board of Directors v. Bodkin Bros.*, supra, dealt with an attempt to attach the funds of the St. Francis levee district, which was a public corporation, clothed with governmental duties and functions, organized under the laws of Arkansas, with an office in the city of Memphis.

So, it will be seen that this court has extended the same immunity against proceedings by garnishment to agencies of other governments that it extends to agencies of the government of the State of Tennessee.

Under Public Act No. 107 of the Sixty-Fifth Congress, approved March 21, 1918 (Act March 21, 1918, chapter 25, 40 Stat. 451 [U. S. Comp. St. 1918, sections 3115 $\frac{3}{4}$ a-

Dickens v. Bransford Realty Co.

3115 $\frac{3}{4}$ p]), and under previous statutes and the proclamation of the President, the railroads of the country, including the defendant Nashville Terminals, are now merely agencies or instrumentalities of the United States government.

While it is true Public Act No. 107 of the Sixty-Fifth Congress above referred to, very broadly authorized suits against such common carriers, still their liability to suit is not greater than that of the various municipal corporations of this State. Such liability, however, should be confined to their own creditors. Since it is the settled policy of this State to hold immune from garnishments all municipalities and other governmental agencies, we think such protection must be accorded to defendant Nashville Terminals, as it is now operated.

Moreover, section 10 of the Act of Congress above referred to (U. S. Comp. St. 1918, section 3115 $\frac{3}{4}$ j), expressly provides that "no process, mesne or final, shall be levied against any property under such federal control," and this would doubtless preclude proceedings by attachment and garnishment.

We have not had occasion to consider in this opinion the effect of General Order No. 43, promulgated by the Director General of Railroads September 5, 1918, which undertook to exempt carriers under federal control from proceedings by garnishment; however, as stated heretofore under our previous decisions, we think such carriers so operated are freed from such process.

It results that the judgment of the lower court will be reversed, and this suit dismissed.

Ogilvie v. Hailey.

J. A. OGILVIE *et al v.* ROMANS HAILEY, Clerk, *et al.*

(Nashville. December Term, 1918.)

1. **CONSTITUTIONAL LAW.** Constitutionality of statute. Sufficiency of objection.

Where a bill is bottomed on the unconstitutionality of a statute, it is duty of complainant to point out and state with particularity details of supposed invalidity. (*Post, pp. 394-396.*)

Acts cited and construed: Acts 1907, ch. 141; Acts 1915, ch. 407; Acts 1917, ch. 441.

2. **EQUITY.** Demurrer. Sufficiency.

A demurred which challenges generally the legal conclusions of a bill bottomed on unconstitutionality of a statute is sufficient (*Post pp. 394-396.*)

3. **CONSTITUTIONAL LAW.** Constitutionality of statute—Presumption.

Every intendment is in favor of the constitutionality of a statute. (*Post, pp. 394-396.*)

4. **CONSTITUTIONAL LAW.** Statutes. Constitutionality. Presumption.

If any possible reason can be conceived to justify classifications in revenue statutes, they will not be held unconstitutional as discriminatory. (*Post, pp. 396, 397.*)

5. **LICENSES.** Privilege tax. Discrimination.

Priv. Acts 1915, chapter 407, assessing a privilege tax on automobiles used for pleasure, but not on automobiles used for business, is not unconstitutional as arbitrary and discriminatory. (*Post, pp. 396, 397.*)

Cases cited and approved: State v. McKay, 137 Tenn., 280; City of Memphis v. State ex rel., 133 Tenn., 83; Motlow v. State, 125 Tenn., 547.

6. **LICENSES.** "Privilege" Automobiles.

As was done in Priv. Acts 1915, chapter 407, the use of automobiles on highways for pleasure may be declared a "privilege." (*Post, pp. 397, 398.*)

Ogilvie v. Halley.

Cases cited and approved. State v. Alston, 94 Tenn., 674; State ex rel. v. L. & N. R. R. Co., 139 Tenn., 406; State ex rel. v. American Trust Co., 208 S. W., 611.

7. STATUTES. Title. Licenses. Motor vehicles.

The caption of Priv. Acts 1915, chapter 407, entitled "an act to provide revenue by assessing a privilege tax," etc., "on automobiles and motorcycles used for pleasure," etc., conforms to the body of the act. (*Post*, p. 398.)

8. LICENSES Statutes. Purpose and disposal of taxes.

Priv. Acts 1915, chapter 407, assessing a privilege tax on automobiles used for pleasure, must be construed together with Priv. Acts 1917, chapter 441, creating a board of highway commissioners, etc., and hence is not open to the attack that it contains no provision for the expenditure of such taxes when collected. (*Post*, p. 398.)

9. CONSTITUTIONAL LAW. Necessity of determining question. Issues.

In a suit to enjoin the collection of a privilege tax on automobiles under Priv. Acts 1915, chapter 407, on ground that such statute was unconstitutional, court need not pass on question as to whether or not penalty provided in section 2 was excessive and vitiated the statute, where no penalty was involved in the suit in question. (*Post*, p. 398.)

10. STATUTES. Partial Invalidity. Licenses.

Even though the penalty provided in Priv. Acts 1915, chapter 407, section 2, for nonpayment of privilege tax on pleasure automobiles should be held to be excessive and unconstitutional; it would not vitiate the remainder of the act. (*Post*, p. 398.)

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.
—Hon. Jas. B. NEWMAN, Chancellor.

Ogilvie v. Hailey.

Roscoe Bond, Wm. Fuqua and Lurton Goodpasture, for appellants.

T. J. McMORROUGH, for appellees.

MR. CHIEF JUSTICE LANSDEN delivered the opinion of the Court.

The bill in this cause was filed to enjoin the collection of a privilege tax on automobiles used for pleasure, applicable to Davidson county. It is averred that the statute authorizing this tax is unconstitutional. A demurred was interposed, which was sustained by the chancellor, and the complainants have appealed to this court.

Some criticism is made of the form of the demurrer. It is insisted that it is too broad in its terms to be considered. Where a bill is bottomed on the unconstitutionality of a statute, it is the duty of the complainant to point out and state with particularity the details of the supposed conflict of the statute with the organic law. In such a case a demurrer which challenges generally the legal conclusions of the bill is sufficient. Every intendment is in favor of the statute and against the attack, and the complaint must lay his grounds of attack with the precision ordinarily required of a demurrant.

The statute involved is chapter 407 of the Private Acts of 1915, entitled:

"An act to provide revenue by assessing a privilege tax in counties having a population of from 149,000 to 190,000 inhabitants by the federal census of 1910, or any subsequent federal census, on automobiles and motorcycles used for pleasure, to oil the turnpike roads of

Ogilvie v. Hailey.

said county which are under the supervision of the turnpike board."

Section 1 of the act provides that a privilege tax shall be collected in the counties named, by the county court clerk, on all automobiles and motorcycles used for pleasure, of \$7.50 on seven-passenger automobiles, \$5 on five-passenger automobiles, \$3 on two-passenger automobiles, and \$2 on motorcycles, and it is provided that said tax is to be paid annually to the county court clerk as other privilege taxes.

Section 2 provides that the owners of such vehicles shall pay said privilege tax in advance, and that any violation of the act subjects them to payment of a penalty of \$25, and that said tax and penalty shall be a lien on said machines.

Section 3 provides that it shall be the duty of the county court clerk to turn over to the county trustee all collections under this statute, to be placed by the trustee "to the credit of account for oiling turnpikes in said counties."

The foregoing act, as stated, was passed by the legislature of 1915. Prior to this was chapter 141 of the Acts of 1907, creating a turnpike board for Davidson county. Omitting reference to other Davidson county road laws, by chapter 441 of the Private Acts of 1917 a board of highway commissioners was created for Davidson county, which was given charge of all the highways of the county, both turnpikes and roads, and it was provided in the act of 1917 (section 15) that—

"All funds assessed for pike and district road purposes shall be collected by the county trustee as now provided by law and shall be paid out on the warrants of the county judge on orders signed by the superin-

Ogilvie v. Hailey.

tendent of roads and countersigned by at least two members of the board of highway commissioners."

The bill herein was filed July 19, 1917, after the aforesaid act of 1917 was passed. Therefore, at the time this suit was brought, there was in force chapter 407 of the Private Acts of 1915, herein attacked, and chapter 441 of the Private Acts of 1917, creating the board of highway commissioners, and conferring upon such board jurisdiction of the turnpike roads of Davidson county.

So far as these complainants are concerned, these two acts must be construed together, *in pari materia*, as part of the same scheme of legislation. This latter observation removes some of the objections urged to the act of 1915 by the complainants herein, and by Mr. Shannon in the Annotations in his new Code. For the purpose of this suit, both these statutes may be treated as one.

It is first insisted that the taxation of automobiles used for pleasure and failure to tax automobiles used for business is an arbitrary and unconstitutional discrimination.

The later decisions of this court and of the Federal supreme court have conceded to the legislature a very wide range of discretion in the matter of classification in police statutes and revenue statutes. The idea is that, if any possible reason can be conceived to justify the classification, it will be upheld. *State v. McKay*, 137 Tenn., 280, 193 S. W., 99, Ann. Cas., 1917E, 158; *City of Memphis v. State ex rel.*, 133 Tenn., 83, 179 S. W., 631, L. R. A., 1916B, 1151, Ann. Cas., 1917C, 1056; *Motlow v. State*, 125 Tenn., 547, 145 S. W., 177, L. R.

Ogilvie v. Hailey.

A., 1916F, 177—and federal cases reviewed in these three decisions.

It is possible that automobiles used for pleasure run more rapidly and are more destructive to the county roads. It is possible that no automobiles are used for business purposes except in the interest of a business that itself pays a privilege tax. It is possible that other reasons may exist for this discrimination, which we think of, and we are not disposed to say that this classification is arbitrary and unreasonable.

It is next insisted that the use of automobiles for pleasure cannot be declared a privilege, inasmuch as such use is not the pursuit of any business or occupation, and it is sought to limit a privilege to such pursuits.

While some of our older cases apparently justify these arguments, later decisions of this court declare that the doing of a single act may be declared a privilege. The right to inherit may be declared a privilege. *State v. Alston*, 94 Tenn., 674, 30 S. W., 750, 28 L. R. A., 178.

The transfer of property to a foreign corporation may be declared a privilege. *State ex rel. v. L. & N. R. R. Co.*, 139 Tenn., 406, 201 S. W., 738.

The right of registration may be declared a privilege. *State ex rel. v. American Trust Co.*, 208 S. W., 611.

In view of our later decisions, we have no hesitation in holding that the legislature may declare it to be a privilege to operate pleasure cars over the turnpike roads of our counties. Such operation amounts indeed to the pursuit of an occupation with many, although not for gain.

Ogilvie v. Hailey.

It is again urged that the caption of the act does not conform to its body. We have carefully examined the statute, and think this objection is hypercritical and unsound, and does not merit discussion.

It is also said that the act is unconstitutional in that it authorizes the collection of this privilege tax by the county court clerk to be turned over to the county trustee, to be placed to the account for oiling turnpikes, but that it nowhere contains any provisions for the expenditure of said fund nor authorizes the payment of such fund, when collected, to any public purpose or good.

The latter criticism is entirely obviated by construing this act in connection with the act of 1917, which does provide exactly how the taxes raised for road purposes shall be appropriated and paid out.

It is finally insisted that the penalty of \$25 provided by the act is so excessive as to be invalid, and it is argued that this vitiates the entire statute.

There is no question of the penalty involved in this case, and we do not find it necessary to pass on the validity of this portion of the statute. If it were involved, and should be held to be excessive and unconstitutional, the penalty could be easily elided without affecting the remainder of the statute, and this course would doubtless be followed by the court.

We are of opinion that there is no error in the decree of the chancellor, and the same is affirmed.

Menees v. Ewing.

R. L. MENEES v. F. E. EWING.

(Nashville. December Term, 1918.)

ELECTIONS. Method of designating candidate. Mandatory provision..

Shannon's Code section 1248, as to voter designating candidate of his choice by a cross (X), is not mandatory in the sense that a voter who uses a different mark, such as a check mark, will be deprived of his vote even when the intention is clear and obvious in view of section 1255; the provision of the latter section that none but ballots provided in accordance with the article shall be counted having reference to ballots described in section 1233 et seq. and not to manner of marking ballots.

Cases cited and approved: Parker v. Orr, 158 Ill., 609; Rail v. Potts et al., 27 Tenn., 225.

FROM MONTGOMERY.

Appeal from the Circuit Court of Montgomery County.—Hon. W. L. Cook, Judge.

Wm. DANIEL, Jr., and AUSTIN PEAY, for appellant.

DANCEY FORT, for appellee.

MR. CHIEF JUSTICE LANSDEN delivered the opinion of the Court.

This is an election contest over the office of justice of the peace in the First district of Montgomery county. The suit was instituted in the county court and carried from thence to the circuit court of the county. Both courts held that the contestee, Ewing, was duly and legally elected as shown by the return of the officers of

Menees v. Ewing.

election. An appeal was prosecuted to this court, and errors have been assigned, which present a number of questions, but the only matter of public interest is the question presented upon the two ballots cast for contestee marked with a check mark instead of a cross mark.

We are satisfied that the ballots were preserved so that the ones inspected by the county judge, and later by the circuit judge, and presented for our inspection, are the true ballots deposited in the ballot box by the voters. It was so held in the county court and the circuit court, and there is evidence to support the holding.

As to the other ballots counted for contestee, and which present the question of fact as to whether the voters intended to place the cross mark opposite the name of contestee, we are satisfied with the holding of the county and circuit courts, which were in accord with the action of the election officials. By a personal inspection of the ballots all of these authorities concluded that the voters designated contestee in a proper manner by the making of the cross mark opposite his name. We affirm their action as to this.

As to the ballots upon which the name of contestee was designated by a check mark. The point made against these ballots is that the voters used a check mark instead of a cross mark. No point is made that the mark used could designate any other name than that of contestee, and that the voter intended to designate another than him as his choice for the office of justice of the peace. It is insisted that the statute having designated a cross mark (X) as the way by which

Menees v. Ewing.

voters are to select their choice of candidates, no other mark can be allowed; the insistence being that the language of the statute is mandatory, and the court has no discretion in the matter.

The Dortch Ballot Law originated in the act of 1890 First Extra Session, chapter 24. So far as we are advised it has not been construed by this court with respect to the question presented in this case. An examination of the statute discloses that it inaugurated a new method of voting in the territory to which it has application. It designates the ballot and the manner of issuing them as well as the way in which the voter shall cast his vote. The main purpose of the act is to secure privacy upon the part of the voter in casting his ballot and to secure purity in the elections. After describing in considerable detail how the election booths are to be established, the ballots are to be furnished, the kinds of ballots, and other details respecting the election, the marking of the ballot by the voter is set forth in the following language found at section 1248 of Shannon's Annotated Code.

"He shall then go to one of the voting shelves, tables, or compartments, and shall prepare his ballot by marking in the appropriate margin or place a cross (X) opposite the name of the candidate of his choice for each office to be filled, or by filling in the name of the candidate of his choice in the blank space provided therefor and marking a cross (X) opposite thereto, and likewise a cross opposite the answer he desires to give in case of a constitutional amendment."

The act then describes how the ballot is to be folded and the stub torn off, the manner and time of voting, to prevent repeating, who are allowed in the room, spoiled ballots, assistance to physically disabled voters,

Menees v. Ewing.

and then describes what are known as improperly marked ballots. This provision is found in section 1255 of the foregoing Code, and is as follows:

"If the voter marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office. But this shall not vitiate the ballot so far as properly marked. No ballot without the official indorsement of the chairman of the board of commissioners shall be deposited, and none but ballots provided in accordance with the provisions of this article shall be counted."

It will be perceived that section 1248 sets forth in detail the manner in which the voter shall cast his ballot, and designates how the candidates of the voter's choice are to be pointed out by him, and the designation selected by the legislature is the cross (X) opposite the name of the candidate. Anticipating that some of the ballots will be improperly marked, section 1255 points out the effects of improperly marking them. It is seen that it is there provided if the voter marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any office to be filled, his ballots shall not be counted for such office. But to prevent a misunderstanding of the language employed, the legislature expressly provided that such was not to vitiate the ballot so far as properly marked. It is specified, however, that ballots which are not provided in accordance with the provisions of this article are not to be counted. We think the reference last made is to ballots described in section 1233 et seq., and not to the manner

Menees v. Ewing.

of marking ballots. The legislature designated the cross (X) as the proper way to designate the candidate for whom the voter was voting, but it did not intend by this designation to deprive a voter of his vote if he had so marked his ballot that his intention was made clear and obvious to the officers of election. We think this is shown by the two sections of the act set forth in this opinion. To deprive a voter of his vote when he makes his choice clear and obvious is such an act of apparent injustice that the intention to do so will not be ascribed to the legislature, unless the language employed by it in reference to the matter is plain and unambiguous. It cannot be assumed that the legislature intended to deprive a voter of his choice merely upon the form of the mark employed to designate the candidate voted for. This all assumes what is not denied in this case, that the voter employed a method of designating the candidate for whom he intended to vote, which was clear.

Of course, what has been said cannot have application to marks or insignia, which are used upon the ballot for the purpose of designating a particular candidate, or candidates, for whom the voter should vote. It has effect only in those cases in which the intention of the voter to designate the candidate of his choice by the unusual mark is clear and satisfactory. 9 Ruling Case Law, 132; 15 Cyc., 353; *Parker v. Orr*, 158 Ill., 609, 41 N. E., 1002, 30 L. R. A., 230. See, also, *Rail v. Potts et al.*, 8 Humph., 225.

The clear weight of authority is to the effect that the method of marking the ballot is not mandatory in the sense that the voter will be deprived of his vote if it

Menees v. Ewing.

is clear that the only question involved is the use of the mark by the voter to designate his choice. Each State has an act upon the subject with more or less divergence from our own, and, of course, the cases upon the subject, of which there are many are only persuasive.

Affirmed.

State ex rel. v. City of Nashville.

STATE ex rel. WILLIAMS v. CITY OF NASHVILLE et al.

(*Nashville.* December Term, 1918.)

1. STATUTES. Title and subject-matter. Amendments. Officers' compensation.

Priv. Acts 1917, chapter 525, providing for the payment of salaries to fire and police departments of the city of Nashville, designated in its caption to amend the city charter, being an amendatory act, it is not unconstitutional, as violating Constitution, article 2, section 17, relating to title of statutes, since an amendment incorporating provisions germane to the original act sought to be amended need recite nothing further than a correct statement of title of the original act. (*Post*, pp. 409, 410.)

Acts cited and construed: Acts 1917, ch. 525.

Cases cited and approved: *Hyman v. State*, 87 Tenn., 110; *Wright v. Cunningham*, 115 Tenn., 454; *Memphis Street Ry. Co. v. State*, 110 Tenn., 613; *Goodbar et al. v. City of Memphis et al.*, 113 Tenn., 38; *City Lumber Co. v. Temple*, 138 Tenn., 91.

Case cited and distinguished: *State ex rel. v. Algood*, 87 Tenn., 166.

Constitution cited and construed: Art. 2, sec. 17.

2. STATUTES. Reading of bills. Amendments.

Where Priv. Acts 1917, chapter 525, amending city charter of Nashville, in its original form had been passed three times in the Senate and sent to the House, where it was substituted for an identical bill, which had been twice read in the House, and then amended by unnecessary additions and read a third time and passed and sent to the Senate, where amendment was concurred in and bill approved by Governor, it was not a violation of Constitution, article 2, section 18, requiring three readings of a bill in each house. (*Post*, pp. 410, 411.)

Cases cited and approved: *Erwin v. State*, 116 Tenn., 80; *State v. Bradt*, 103 Tenn., 584.

State ex rel. v. City of Nashville.

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.
—HON. JAS. B. NEWMAN, Chancellor.

A. G. EWING, JR., and J. WASHINGTON MOORE, for appellants.

W E. NORVELL, JR., for appellees.

MR. JUSTICE BACHMAN delivered the opinion of the Court.

The constitutionality of chapter 525 of the Private Acts of 1917 is here assailed by a demurrer filed by the city of Nashville and its commissioners to a bill filed against them by the members of the fire department of the city of Nashville on relation, wherein it was sought to compel the city authorities to adopt an ordinance fixing the salaries of the members of the fire department, as provided in the act under consideration.

The caption of the act, as finally passed, is as follows:
“An act to be entitled ‘An act to amend an act entitled “An act to create a municipal corporation to be known as the city of Nashville, and to define its rights, powers, duties and obligations, and to repeal all laws or parts of laws in conflict with the provisions of this act,”’ being chapter 22 of the Private Acts of the General Assembly of the State of Tennessee for the year 1913 by amending section 17 thereof so as to

State ex rel. v. City of Nashville.

provide for the payment of certain salaries to the members of the fire department and the police department of said city of Nashville.' "

It appears from the legislative journals that the act is the embodiment of Senate Bill No. 1210, with the exception that in the course of its three passages in the Senate it contained no reference to the police department of the city of Nashville. House Bill No. 1619, identical in caption and body with Senate Bill No. 1210, had passed two readings on April 7, 1917, when senate Bill No. 1210, having passed its third reading and had been transferred to the House, was substituted for House Bill No. 1619, and amended in the House by adding to the caption the language, "and the police department of the city of Nashville," and also by providing in the body of the bill for a schedule of salaries for the members of the police department, which the city authorities were required to adopt by ordinance. In its amended form Senate Bill No. 1210 was finally passed by the House on April 7, 1917, and on that date was transmitted to the Senate, where the amendments previously made in the House were upon motion concurred in. The bill was duly signed and was approved by the Governor.

From the foregoing summary history of the bill it will be seen that in its original form and as passed on three readings in the Senate and two readings in the House, it contained no reference to the police department of the city of Nashville, and that only after substitution in the House was the caption and body of the bill amended so as to include in the charter changed provisions affecting the salaries of members of that department.

State ex rel. v. City of Nashville.

Upon this state of facts the appellants contend that the procedure attending the enactment of the measure is not in accord with sections 17 and 18 of article 2 of the Constitution of the State, and the act is therefore void. These sections of article 2 of the Constitution are as follows:

"Sec. 17. Bills may originate in either house, but may be amended, altered, or rejected by the other. No bill shall become a law which embraces more than one subject, . . . to be expressed in the title. All acts which repeal, revive or amend former laws, shall recite in their caption or otherwise the title or substance of the law repealed, revived or amended.

"Sec. 18. Every bill shall be read once on three different days, and be passed each time in the house where it originated, before transmission to the other. No bill shall become a law until it shall have been read and passed, on three different days in each house, and shall have received on its final passage, in each house, the assent of a majority of all the members to which that house shall be entitled under this Constitution; and shall have been signed by the respective speakers in open session—the fact of such signing to be noted on the journal; and shall have received the approval of the Governor, or shall have been otherwise passed under the provisions of this Constitution."

It is to be noted that the act in question is an amendatory, and not an original, measure, and, further, that while its effect is to provide for the payment of certain salaries to designated municipal employees, it is an act specifically designated by its caption as amending the charter of incorporation of the city of Nashville.

State ex rel. v. City of Nashville.

The fixing of salaries within certain limits is the particular wherein the subject is to be changed.

As an amendatory act, we are of opinion that the same is not obnoxious to the provisions of the Constitution. It has been repeatedly held by us that an amendment incorporating provisions germane to the subject of the original act sought to be amended need recite nothing further than a correct statement of the title of the original act. *Hyman v. State*, 87 Tenn., 110, 111, 9 S. W., 372, 1 L. R. A., 497; *State ex rel. v. Algood*, 87 Tenn., 166, 10 S. W., 310; *Wright v. Cunningham*, 115 Tenn., 454, 455, 91 S. W., 293; *Memphis Street Railway v. State*, 110 Tenn., 613, 75 S. W., 730.

And, as stated in the case of *State ex rel. v. Algood*:

"The criticism is that this title does not indicate the character of the proposed amendment. This is not necessary if, in fact, the amendment is germane to the original act and is embraced within the title of the original or amended act. In such case, the title of the original act being made a part of the title of the amendatory act, the particulars of the amendment need not be shown by the title."

We have further held that, where the caption of an amendatory act contains a recital of the title of the original act proposed to be amended, it is unnecessary that the particular character of the amendment be indicated, and that unnecessary recitals in a title or superfluous matter therein do not invalidate an act otherwise constitutional. *Goodbar et al. v. City of Memphis et al.*, 113 Tenn., 38, 81 S. W., 1061; *City Lumber Co. v. Temple*, 138 Tenn., 91, 195 S. W., 1127.

State ex rel. v. City of Nashville.

It is insisted for the appellants that the insertion in the caption of the act of the language "by amending section 17 thereof so as to provide for the payment of certain salaries to the members of the fire department" operated to restrict and limit the subject and extent of the proposed amendment, and that therefore the restricted title could not thereafter be made by adding the words "and the police department of said City of Nashville," without constituting the bill in effect a new one, and one subject, as amended, to the requirements of section 18 of article 2 of the Constitution.

This insistence would necessarily be upheld if the act were an original one, or if the language used to particularly describe the nature of the amendment could be construed as an expression of the subject of the legislation, but, as above noted, the one subject expressed in the title and coming within the constitutional limitation is the amendment of the city charter. It is the constant quantity fixing the identity of the bill, as stated in *Erwin v. State*, 116 Tenn., 80, 93 S. W., 73, and as expressed it presents a valid constitutional amendatory act which was regularly enacted.

The added language specifically designating the particulars wherein the charter was to be amended, was unnecessary and superfluous, and its additions cannot be held to invalidate that which was constitutionally sufficient without it. To so hold would be subversive of the fundamental principle that every intendment must be made for, and all doubts resolved in favor of, the constitutionality of the act.

In support of the contention made for the appellants we are cited to the case of *State v. Bradt*, 103 Tenn.,

State ex rel. v. City of Nashville.

584, 53 S. W., 942. As pointed out in *Goodbar v. Memphis*, supra, this case is authority for the proposition that legislation under a limited and restricted title must be confined to the limits prescribed, and the principle was there correctly applied. The title of the act there being considered related alone to one subject, while the body of the act embraced three separate and distinct subjects of legislation. Here we have an amendatory act, reciting in its caption the title of the original act, and embracing legislation coming within the purview of the original act.

The decree of the chancellor is affirmed, and the case remanded.

Hickman v. Wright.

LITTON HICKMAN, County Judge, *v.* JOE W. WRIGHT,
Sheriff.

(Nashville. December Term, 1918.)

1. CLERKS OF COURTS. Counties. Equity. Registers of deeds. Sheriffs and constables "throughout the state." Fees. Statutes.

Acts 1917, chapter 47, providing that clerks of court, masters in chancery, county trustees, registers of deeds, and sheriffs throughout the State shall be deprived of their fees and compensated only by salary as hereinafter provided, must be construed as depriving such officers of their fees in counties of less than 30,000 population, though salary for such officers was not thereinafter provided. (*Post*, pp. 417, 418.)

Acts cited and construed: Acts 1917, ch. 47; Acts 1897, ch. 124.

2. STATUTES. Construction. Omission.

A pure *casus omissus* occurring in a statute can never be supplied or relieved against by the court under any rule or canon of construction or interpretation. (*Post*, p. 418.)

Cases cited and approved: Kelly *v.* State, 123 Tenn., 516; State ex rel. Board, etc., of Benton County *v.* Boice, 140 Ind., 506.

3. STATUTES. Construction. Ambiguity.

If actual language and provisions of statute are plain and clear, and are devoid of contradiction, or any affirmative ambiguity, so that statute, as result of express provisions, is not reasonably susceptible of twofold meaning, there is no room for applying any other rules or canon of construction. (*Post*, pp. 418, 419.)

Cases cited and approved: Miller *v.* Childress, 21 Tenn., 319; Kirk *v.* State, 41 Tenn., 344; State *v.* Manson, 105 Tenn., 232; Samuelson *v.* State, 116 Tenn., 470; Darnell *v.* State, 123 Tenn., 663; Heiskell *v.* Lowe, 126 Tenn., 475; State *v.* Wheeler, 127 Tenn., 58; Palmer *v.* Express Co., 129 Tenn., 116.

Hickman v. Wright.

4. **CLERKS OF COURTS.** Constitutional law. Counties. Registers of deeds. Sheriff and constables. Fees. Due process of law. Class legislation.

Acts 1917, chapter 47, depriving clerks of courts, sheriffs, registers of deeds, masters in chancery, and county trustees throughout the State of fees, and providing salaries for only a part of them, is unconstitutional, as depriving part of such officers of compensation, contrary to "the law of the land," and as "class legislation" (Const. article 1, section 8, and article 11, section 8). (*Post*, p. 419.)

Acts cited and construed: Acts 1917, ch. 47.

Constitution cited and construed: Art. 1, sec. 8; Art. 11, sec. 8.

5. **STATUTES.** Special laws. Classification of officers. Compensation.

Acts 1917, chapter 47, classifying certain officers for purposes of compensation according to population of their respective counties, making the minimum of one class and the maximum of the succeeding class the same, violates Constitution article 11, section 8, as allowing one in a certain class to enjoy a greater benefit than others in the same class. (*Post*, pp. 419, 422.)

6. **CONSTITUTIONAL LAW.** Delegation of legislative power. Imposition of non-judicial duties on judiciary.

In view of Constitution article 11, section 9, legislature, in passing Acts 1917, chapter 47, did not violate Constitution article 2, sections 1, 2, relating to delegation of legislative power and imposition of nonjudicial duties upon judiciary, when it delegated to the courts authority to determine the number of deputies of county officers unable to perform all the duties of the office and the salaries they were to receive. (*Post*, pp. 422, 423.)

Acts cited and construed: Acts 1917, ch. 47.

Constitution cited and construed: Art. 11, sec. 9; Art. 2, secs. 1, 2.

FROM DAVIDSON.

Error to the Criminal Court of Davidson County.—
Hon. J. D. B. De Bow, Judge.

Hickman v. Wright.

W. E. NORVELL, JR., and PITTS & McCONNICO, for Wright.

FRANK M. THOMPSON, T. J. McMORROUGH and R. LEE BARTELS, for Hickman.

MR. JUSTICE MCKINNEY delivered the opinion of the Court.

This suit involves the constitutionality of chapter 47 of the Acts of 1917, known as the "anti-fee bill."

The lower court held the act to be unconstitutional, and the case has been brought to this court by appeal.

The caption and the first two sections of the act are as follows:

"An act to be entitled, 'An act fixing the salaries of certain county officials in the state, to wit: The several clerks and masters of the chancery courts, clerks of the various county and probate, circuit, criminal and special courts, county trustee, register of deeds and sheriffs; to provide for the disposition of the fees of their offices; to fix the salaries of said offices and to provide for the payment thereof; to provide for the appointment and removal of deputies and assistants of said officers and to prescribe the manner of fixing their salaries and the payment thereof, and to provide for the payment of the expenses of the offices, and to provide punishment for the violation of certain provisions of this act, and otherwise regulate the rights, duties and liabilities of the said officers, and to provide for a system of auditing for said offices.'

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, that the clerks and masters of the various chancery courts, the clerks of the various

Hickman v. Wright.

circuit, county and probate, criminal and special courts, county trustees, registers of deeds, and sheriffs throughout the State shall be deprived of all their fees, commissions, emoluments and perquisites that shall hereafter accrue, or be received by virtue of their respective offices; and they shall be compensated for their services by salaries alone as hereinafter provided, the same to be payable as hereinafter provided, which salaries shall be in lieu of all other compensations, provided that nothing in this act shall be construed to apply or refer to any fees, commissions, emoluments or perquisites in which said officers shall have a vested right at the time this act goes into effect.

“Sec. 2. Be it further enacted, that for the purposes of determining the salaries to be received by the various officers mentioned in section 1 of this act, the several counties of the State, except counties having a population under 30,000 according to the federal census of 1910, or any subsequent federal census, are hereby divided into classes as follows:

“Counties having a population of not less than 190,000 shall constitute counties of the first class.

“Counties having a population of not more than 190,000, and not less than 140,000, shall constitute counties of the second class.

“Counties having a population of not more than 140,000, and not less than 85,000, shall constitute counties of the third class.

“Counties having a population of not more than 85,000, and not less than 37,500 shall constitute counties of the fourth class.

“Counties having a population of not more than 37,500, and not less than 30,000 shall constitute counties

Hickman v. Wright.

of the fifth class, and provided that the population of the several counties for the purpose of this act, shall be determined by the federal census of 1910 and by each succeeding federal census."

The third section fixes the salaries of the various officials in the five classes of counties enumerated in the second section.

It is admitted that the counties contained in said five classes are as follows: First class, Shelby; second class, Davidson; third class, Hamilton and Knox; fourth class, Gibson, Madison, and Maury; and fifth class, Fayette, Giles, Green, Montgomery, Rutherford and Weakley—making a total of thirteen counties, while there are eighty-three counties that are not classified, and for whose officials no compensation, either as salaries or fees, is provided.

It is insisted by the appellee that the caption and section 1 of the act declare in plain language an intent to deprive the county officials in all counties throughout the state of all fees, emoluments, etc., thereafter received by them, and that all such offices should thereafter be compensated by salaries alone, which would be fixed by the provisions of the act, but that the act failed to carry out this purpose and plan, and overlooked providing such salaries for officials of the counties having a population of less than 30,000.

On the other hand, it is insisted by the plaintiff in error that it was the intention of the legislature to limit the act to officials in counties having a population of 30,000 or over; that is to say, that the words "throughout the State," contained in section 1 of the act, followed by the words "as hereinafter provided," had reference to those officials "throughout the State"

Hickman v. Wright.

in the counties of 30,000 in population or over as thereinafter provided.

The act is not susceptible to this latter construction. The language is plain, unambiguous, and uncontradictory. The caption of the act says:

"An act fixing the salaries of certain county officials in the State, to wit: The several clerks and masters of the chancery courts, clerks of the various county and probate, circuit, criminal and special courts," etc.

There is nothing in the language used to suggest that the deprivation of fees was only applicable to officials in the thirteen counties composing the five classes, or that salaries were to be paid only to such officials within said thirteen counties. And the same is true of section 1 of the act, which says:

"That the clerks and masters of the various chancery courts," etc., "throughout the State shall be deprived of all their fees, commissions," etc., "and they shall be compensated for their services by salaries alone as hereinafter provided."

Webster's International Dictionary defines the word "throughout" to mean "from one extremity to the other of; in every part of." The meaning of this part of the act is that all the clerks, trustees, sheriffs, etc., in the entire state, are deprived of their fees, etc.

This construction is strengthened by the fact that section 1 of the acts of 1917 is almost a *verbatim* copy of section 1 of chapter 124 of the Acts of 1897, known as the "Estes fee bill." In this latter act we know that, in using the identical language as that used in the act under consideration, the legislature intended to deprive such officials in all of the counties in the State of their fees, etc., for, in a subsequent part of the act,

Hickman v. Wright.

they provided salaries for all such officials, and when the legislature used this language in the act of 1917, they evidently intended the language used to bear the same construction as was intended by the language used in the act of 1897.

It is apparent, therefore, that the legislature intended to deprive all state officials, enumerated in the act, of their fees, and to put them on a salary basis; but, for some unexplained reason, they overlooked fixing salaries for such officials in the eighty-three counties having a population of less than 30,000. Such an oversight is termed in law a "*casus omissus*."

A pure "*casus omissus*" occurring in a statute can never be supplied or relieved against by the court under any rule or canon of construction or interpretation. Lewis' Sutherland, Statutory Construction (2d Ed.), vol. 2, sections 605, 606; 11 Corpus Juris, p. 31, note 69; 26 Am. & Eng. Ency. of Law (2d Ed.), p. 601; *Kelly v. State*, 123 Tenn., 516, 132 S. W., 193; *State ex rel. Board, etc., of Benton County v. Boice*, 140 Ind., 506, 39 N. E., 64, 40 N. E., 113.

The foregoing conclusion is not in conflict with our liberal rules of construction and interpretation of statutes. The universal rule seems to be that if the actual language and provisions of the statute are plain and clear, and are devoid of contradiction or any affirmative ambiguity, so that the statute, as the result of the express provisions, is not reasonably susceptible of a twofold meaning, then there is no room for applying any other rules or canon of construction to the act. Lewis' Sutherland, Statutory Construction (2d Ed.), vol. 2, section 589; 36 Cyc., p. 1106; 26 Am. & Eng. Ency. of Law (2d Ed.), p. 597; *Miller v. Childress*, 2

Hickman v. Wright.

Humph., 319; *Kirk v. State*, 1 Cold., 344; *State v. Manson*, 105 Tenn., 232, 58 S. W., 319; *Samuelson v. State*, 116 Tenn., 470, 95 S. W., 1012, 115 Am. St. Rep., 805; *Darnell v. State*, 123 Tenn., 663, 134 S. W., 307; *Heiskell v. Lowe*, 126 Tenn., 475, 153 S. W., 284; *State v. Wheeler*, 127 Tenn., 58, 152 S. W. 1037; *Palmer v. Express Co.*, 129 Tenn., 116, 165 S. W., 236.

For the court to arbitrarily and dogmatically say that the intent was to withdraw the fees from county officials only in thirteen counties, when the act says such officials "throughout the State" are deprived of their fees, would result in the court making laws rather than construing them.

As a result of this "casus omissus," trustees, clerks, sheriffs, etc., in eighty-three counties of the State are deprived of their salaries and of all other compensation, in violation of "the law of the land" and the "class legislation" provisions of our State Constitution (article 1 section 8, and article 11, section 8).

It is further insisted that said act violates these several provisions of the Constitution in this: That the minimum of the first class and the maximum of the second class are the same (190,000); the minimum of the second class and the maximum of the third class are the same (140,000); the minimum of the third class and the maximum of the fourth class are the same (85,000); and the minimum of the fourth class and the maximum of the fifth class are the same (37,500). From which it follows that any county that may have a population of exactly 190,000 now or hereafter is or will be in two classes, the first and second, at the same time; that any county that

Hickman v. Wright.

may have a population of exactly 140,000 now or hereafter is or will be in two classes at the same time, etc.

This being true, it is insisted that the official in this situation would have the right to choose the higher salaries of the two classes, when no other county in the lower class would have that right, and thus he would enjoy a greater benefit and receive a larger salary than other officials in the same class. This would be true, and therefore violates said constitutional provisions.

Again, Gibson county one of the three counties of the fourth class, has two chancery courts and two clerks and masters, one at Trenton and one at Humboldt; also two circuit courts and two circuits court clerks, one at Trenton and one at Humboldt. The two courts at Humboldt are special courts created by a special act. Hence their clerical officers are clerk and master and clerk of "special courts," and as such they are deprived of all their fees by the first section of the act under consideration, and by the act they are left in that condition. After the first section, special courts and clerks of special courts are never mentioned again in the act.

It follows, therefore, that the clerk and master of the chancery court and the clerk of the circuit court at Humboldt are now allowed neither fees nor salaries, and are deprived of all compensation for their official services, while the clerk and master of the chancery court and the clerk of the circuit court at Trenton, by the second and third sections of the act, are allowed annual salaries of \$2,250 and \$2,000. No good reason has been suggested for this distinction, which, we think, renders the act obnoxious to those provisions of the Constitution with which we have been dealing.

Hickman v. Wright.

It is still further insisted that the act in question, when taken and construed *in pari materia* with more than ninety statutes of the State applicable to the compensation of county officials in counties of under 30,000 inhabitants, clearly amounts to arbitrary and capricious class legislation.

This insistence is made, as we understand it, upon the theory that the court holds the act was intended to apply to only the thirteen counties embraced within the five classes.

Having, however, construed the act to apply to all counties in the State, this insistence is no longer pertinent.

Under these sections of the Constitution it is further insisted that section 5 of the Salary Act of 1917 is arbitrary and capricious, in that it requires excess fees collected by certain county officials in thirteen counties to be paid into the State treasury, and the excess fees collected by other county officials to be paid into the county treasury. Section 5 is as follows:

“Sec. 5. Be it further enacted, that all the excess fees, commissions, perquisites and emoluments, no matter whether such sums arise from fees, commissions, perquisites or emoluments by order or by direction of court, or for pay for special services as trustee, receiver or otherwise that are now or may hereafter be receivable, directly or indirectly by virtue of their offices, by the clerks of the circuit, criminal and special courts and the clerks and masters of the chancery courts shall be paid into the State treasury as a part of the State revenue and are hereby declared to be the property of the State; that all such excess fees, commissions, emoluments and charges of the offices of the trustee, sheriff,

Hickman v. Wright.

clerks of the county and probate courts and registers of deeds shall be paid to the county trustee as a part of the county revenue, and the same are hereby declared to be the property of the respective counties wherein the same are collected."

It is insisted that, to the extent that excess fees from any of these county officers in the thirteen larger counties are given to the State, for the benefit of all the other eighty-three counties and the taxpayers thereof, to just that extent the people and taxpayers in the thirteen larger counties are having their tax burdens increased for the benefit of the taxpayers in the other eighty-three counties, who are having their tax burdens correspondingly lightened. This contention seems to be based, also, upon the idea that the act was intended to apply to only the thirteen counties, while we have held that the act was intended to apply to all of the counties of the State. It is unnecessary, therefore, to pass upon this question.

The question as to the reasonableness of such division of the revenues resulting from excess fees between the State, on the one hand, and the county, on the other, where officials in all of the counties of the State are put upon a salary basis, as was done in the Estes fee bill, does not arise in this case, for the reason that the legislature omitted to put the officials in the other eighty-three counties on salaries.

It is next insisted that the act is unconstitutional, because it undertakes to delegate legislative power, and also attempts to impose nonjudicial duties upon the judiciary of the State by attempting to saddle upon the judges and chancellors below, and appellate judges on appeal, without any statutory limitation or rule to

Hickman v. Wright.

guide them, the raw political function and duty of fixing the number and salaries of all the deputies of all the county officers in all of the counties to which the act applies, in violation of both section 1 and section 2 of article 2 of our State Constitution.

The act does not provide for any deputies whatever, but by section 6 and section 7 it is provided that, when the officer is unable to perform the duties of the office by putting in his full time, then he may file a petition before the circuit or criminal judge, or the chancellor, as the case may be, etc., asking for the appointment of a deputy or deputies. To this proceeding the county judge or chairman shall be made a party, and, after hearing the evidence, the court shall determine how many deputies shall be appointed and the salaries they are to receive.

Article 11, section 9, of the Constitution of Tennessee provides that "The legislature shall have the right to vest such powers in the courts of justice, with regard to private and local affairs."

As to the policy of delegating to the courts the authority to determine the number of deputies and the salaries they are to receive this court has nothing to do; but if the legislature sees proper to confer this power on the courts, then under the foregoing provision of the Constitution we think it has a right to do so, and that it would not be a wrongful delegation of power, and would not be imposing nonjudicial duties on the courts.

Several other constitutional objections are interposed to the act, which we have carefully considered, and which we think are not well taken. The learned criminal judge was correct in holding the act wholly void, and his judgment is affirmed, with costs.

Chrisman v. Chrisman.

WILLIAM B. CHRISMAN v. ANNIE P. CHRISMAN.

(Nashville. December Term, 1918.)

1. WILLS. Disposition of proceeds of life policy.

The proceeds of life policy payable to testator's estate did not pass under his will giving all his estate, both real and personal, to his wife to have and hold in her own right, but inured to the benefit of widow and only child of testator by former marriage as provided by Shannon's Code, sections 4030, 4231. (*Post, pp. 427-429.*)

Acts cited and construed: Acts 1845-46, ch. 216.

Cases cited and approved: Rison v. Wilkerson, 35 Tenn., 569; Williams v. Carson et al., 68 Tenn., 516; Nashville Trust Co. v. First National Bank, 123 Tenn., 617; Cooper v. Wright, 110 Tenn., 214; Rowlett v. Rowlett, 116 Tenn., 467.

Cases cited and distinguished: Harvey, Adm'r. v. Harrison, 89 Tenn., 476; Rose v. Wortham, 95 Tenn., 511.

2. WILLS. Disposition of proceeds of life policy.

To effectuate the clear intendment of Shannon's Code, sections 4030, 4231, and create the exemption in favor of widow and children, the proceeds of insurance must take a different course from that of disposition by will, for so long as the same are incorporated in the assets of a deceased husband they remain liable to his debts and subject to the claims of creditors under section 3985. (*Post, pp. 429, 430.*)

Case cited and approved: Agee v. Saunders, 127 Tenn., 683.

3. WILLS. Disposition of proceeds of life policy. Intent.

Testator is presumed to have known the effect of Shannon's Code, sections 4030, 4231, relative to disposition of his life insurance, and, in the absence of his express intent to the contrary, the statutory provisions are effective, though it was wholly within his power to prevent application of the sections. (*Post, pp. 430, 431.*)

Code cited and construed: Secs. 4030, 4231 (S.).

Chrisman v. Chrisman.

FROM SUMNER.

Appeal from the Chancery Court of Sumner County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
Hon. J. W. Stout, Chancellor.

BASKERVILLE & McGLOTHLIN, for complainant.

Wm. A. GUILD, for defendant.

MR. JUSTICE BACHMAN delivered the opinion of the Court.

E. E. Chrisman died in Sumner county, Tenn., March 9, 1907, leaving as his survivors Mrs. Annie P. Chrisman, his widow, the defendant herein, and one child, William B. Chrisman, a son by a former marriage, who instituted this suit in the chancery court of Sumner county on July 17, 1910.

The will of Mr. Chrisman is as follows:

“Gallatin, Tennessee, May 4, 1903.

“I, Ernest E. Chrisman, hereby make and publish my last will and testament, revoking and annulling any and all others heretofore made by me.

“To my wife, Annie Chrisman, I give and bequeath all of my estate, both real and personal, to have and to hold in her own name and right.

“I hereby appoint my wife, Annie Chrisman, as guardian of the person of my son, Will Chrisman, such guardianship to be absolute and without the advice or

Chrisman v. Chrisman.

interference of any other person. It is my desire that my friend, William A. Guild, be her legal counsel and adviser in such matters as his services may be needed.

"I hereby direct that if I should be the owner of the Semi-Weekly News at my death that it be sold at the earliest possible date.

"In giving all the property of which I am possessed to my wife, Annie Chrisman, I do so because of her love and affection for me, and believing she will use it as I would in caring for those I love.

"[Signed] ERNEST E. CHRISMAN."

The bill of complainant contended that the will constituted a trust in favor of the complainant and that he was entitled to a one-half interest in the estate, alleging that its net value was some \$10,000; and further that the life insurance of his father was in terms payable to the deceased's estate, and that such insurance did not pass under the will, but under the statute hereinafter set out, the amount of the insurance being \$2,464.67.

A demurrer to the bill was sustained by the chancellor, and upon appeal to the supreme court the same was reversed, and the case came on to be heard. In the answer filed by the defendant any trust was specifically denied. It was also denied that the complainant was entitled to receive any part of the proceeds of the life insurance of the deceased. It set out that when Mr. and Mrs. Chrisman were married the complainant was then a child of about four years; that he lived with the defendant and his father, and after the father's death remained with the defendant until the year 1909, when he left without her consent and contrary to her wishes. The answer further alleged that the estate of the deceased, including insurance, amounted to some

Chrisman v. Chrisman.

\$6,000, and that the defendant had paid debts of the deceased amounting to \$10,000.

Upon the hearing the chancellor dismissed the claims of the complainant in all respects except as to the proceeds of the policy of insurance, decreeing that the complainant was entitled to receive one-half of the same, amounting to \$1,232.33, with interest from the date of the filing of the bill; the amount totaling \$1,816.72. From this decree both complainant and defendant perfected appeals to the court of civil appeals which court affirmed the decree of the chancellor.

The case is before us upon petition for *certiorari* by the defendant widow, and the assignment of error here presents the one question: Did the proceeds of the policy of insurance of the life of the deceased pass under the terms of his will, or does it inure to the benefit of his widow and child, as provided in our statute?

Sections 4030 and 4231 of Shannon's Code are as follows:

"Sec. 4030. A life insurance effected by a husband on his own life shall inure to the benefit of the widow and next of kin, to be distributed as personal property, free from the claims of his creditors."

"Sec. 4231. Any life insurance effected by a husband on his own life shall, in case of his death, inure to the benefit of his widow and children; and the money thence arising shall be divided between them according to the law of distributions, without being in any manner subject to the debts of the husband, whether by attachment, execution, or otherwise."

These sections of the Code, being section 3 of chapter 216 of the Acts of 1845-46, have been construed by this

Chrisman v. Chrisman.

court in numerous cases wherein creditors have sought to have satisfaction of their claims out of the proceeds of life insurance, and it has been consistently held that the act in no wise limited the authority of the husband to control policies of insurance upon his life where the same are payable to his estate—such insurance is the property of the husband and subject to his disposition either during his lifetime or by will. *Rison v. Wilkerson*, 35 Tenn. (3 Sneed.), 569; *Williams v. Carson et al.*, 68 Tenn. (9 Baxt.), 516; *Nashville Trust Co. v. First National Bank*, 123 Tenn., 617, 134 S. W., 311.

It is likewise decided by our cases that, notwithstanding the absolute control and authority of the husband over policies of insurance on his life made payable to his estate, the proceeds of the same do not pass by will in the absence of the use of apt words used therein clearly indicative of such intention, but goes to those entitled, by virtue of the provisions of the statute referred to. *Cooper v. Wright*, 110 Tenn., 214, 75 S. W., 1049; *Rowlett v. Rowlett*, 116 Tenn., 467, 95 S. W., 821.

But it is contended on behalf of the defendant Mrs. Chrisman that the principle above announced is not applicable to the case under consideration for the reason that here no claims of creditors are involved, the contest being one between the widow and child of the deceased husband, and that the statute does not control and was not intended to apply in such cases. To determine this we must look to the purpose of the act and its effect when applied. Its purpose, as expressed in the case of *Harvey, Adm's, v. Harrison*, 89 Tenn., 476, 14 S. W., 1085, is as follows:

“The primary purpose of the act was to exempt life insurance from the claims of creditors, and this is

Chrisman v. Chrisman.

expressed in emphatic and conclusive language. The secondary purpose was to provide for the disposition of this fund. The words inserted for this subordinate intent, dissimilar from the primary object of the act, will not restrict the scope of the act in its main intent. The purpose of the enactment is clear, and this must guide in its application. It was to enable a husband or father to provide a fund after his death for his family."

Again, in *Rose v. Wortham*, 95 Tenn., 511, 32 S. W., 459, 30 L. R. A., 609, it is said:

"It was intended by the statute to provide a fund for the widow and children and next of kin, which, upon the assured's death, should go to them free from the claims of creditors, and, like other exemption laws, they have been liberally construed to carry out the general purpose."

The effect of the act in carrying out its obvious purpose is to remove and set apart, from the assets of the estate of the husband at the time of his death for the benefit of his widow and children, the proceeds of his life insurance, and to prevent such funds from passing into the hands of his executor or administrator. *Williams v. Carson et al.* and *Rison v. Wilkerson*, supra.

As stated in Pritchard on Wills, section 628, the effect of the statute is as follows:

"Its operation is to prefer the widow and children, or next of kin, to creditors, and to prevent the fund passing into the hands of the executor or administrator as assets for the payment of debts, and to require him to distribute it under the statute."

To effectuate the clear intendment of the act and create the exemption in favor of the widow and children, the proceeds of insurance must necessarily take a differ-

Chrisman v. Chrisman.

ent course from that of disposition by will; for, so long as the same are incorporated in the assets of a deceased husband, they remain liable to his debts and subject to the claims of creditors, as provided in section 3985, Shannon's Code, as follows:

"Every debtor's property, except such as may be specially exempt by law, is assets for the satisfaction of all his just debts."

This court has heretofore decided that a policy of insurance coming within the provisions of our statute herein considered is not to be considered as assets, but is exempt property out of which the year's support for a widow and her family cannot be set apart; the insurance fund, by the statute, is separated and divorced from the assets of the husband. *Agee v. Saunders*, 127 Tenn., 683, 157 S. W. 64, 46 L. R. A. (N. S.), 788.

The case of *Weil v. Trafford*, 3 Tenn., Ch., 108, is urged upon us as opposed to our decision herein. This case was before the court in the case of *Cooper v. Wright*, supra, and was not approved. It is in conflict with the decision in *Agee v. Saunders*, supra, which, in our opinion, announces the correct effect of the statute and one to which we adhere.

In diverting the course of such funds, the statute provides that the same shall be divided between the widow and children according to the law of distributions, and, while it is wholly within the power of the husband to prevent the application of the statute, such an intenton will not be presumed, but must appear from unmistakable terms—such is the substance of our holdings where claims of creditors are involved, and we can see no reason for the application of a different

Chrisman v. Chrisman.

principle in this case. The testator is presumed to have known the effect of statutory provisions, relative to the disposition of his insurance, and, in the absence of his expressed intent to the contrary, the statute is effective.

The decree of the chancellor is affirmed.

Montague v. Buchanan.

CORINNE MONTAGUE *et.al.* v. ADYNE BUCHANAN.

(Nashville. December Term, 1918.)

1. HUSBAND AND WIFE. Wife's separate estate. Property conveyed to wife.

A warranty deed to a married daughter, and the heirs of her body, "to have and to hold . . . to the only proper use and behalf of her . . . and her heirs and assigns forever," did not create in her a separate estate, and she could not convey a half interest therein to her husband. (*Post*, pp. 436, 437.)

Cases cited and approved: *Travis v. Sitz*, 135 Tenn., 157; *Gray v. Robb*, 51 Tenn., 74.

Case cited and distinguished: *Houston v. Embry*, 33 Tenn., 480.

2. HUSBAND AND WIFE. Contracts and conveyances between husband and wife. Improvements on wife's real estate.

A husband cannot recover for improvements made on his wife's lots, not her separate property, pursuant to contract by which his wife conveyed to him a one-half interest in such lots; such contract being void, and therefore incapable of creating a lien in favor of the husband upon her land. (*Post*, pp. 437-439.)

Cases cited and distinguished: *O'Malley v. Coughlin*, 3 Tenn. Ch., 431; *Sexton v. Alberti*, 78 Tenn., 452.

FROM WAYNE.

Appeal from the Chancery Court of Wayne County.—
DOUGLAS WIKLE, Chancellor.

ESLICK & ESLICK and HAGGARD & HAGGARD, for appellants.

Montague v. Buchanan.

SIMS & TURMAN and E. W. Ross, for appellees.

MR. JUSTICE MCKINNEY delivered the opinion of the Court.

This is an ejectment suit to recover two lots in the town of Waynesboro, Tenn.

The complainants are the sisters and heirs at law of Mrs. Ella A. Buchanan, who died intestate at her home in Waynesboro in the year 1913.

On January 1, 1872, A. T. Hassel executed to his daughter, Mrs. Ella A. Buchanan, a deed to said two lots; said deed being in words and figures following, to wit:

"For the love and affection I have for my daughter, Ella Ann Buchanan, I hereby give, transfer, and convey to her and the heirs of her body, the following described town lots: [Here follows description.]

"To have and to hold the above-described town lots, with the appurtenances thereto belonging, to the only proper use and behalf of her, the said Ella Ann Buchanan, I hereby bind myself, my heirs, executors, and administrators, to warrant and forever defend the title to the above-described town lots and each of them against the lawful claims of all and every person or persons whomsoever, unto the said Ella Ann Buchanan, and her said heirs and assigns forever."

At the time of this conveyance Ella A. Buchanan was the wife of the defendant, Dr. C. Buchanan, and they lived together as husband and wife until her death.

Evidently proceeding upon the theory that she held said two lots as a separate estate, under the terms of the deed executed to her by her father in 1872, Mrs. Buchanan entered into a contract with her husband in

Montague v. Buchanan.

1893, by which she was to convey to him a one-half interest in said two lots, in consideration for which her husband, Dr. C. Buchanan, was to erect a residence and make other improvements on said lots, and accordingly Mrs. Buchanan, on August 9, 1893, executed the following deed to her husband, to wit:

“For the love and affection I have for my husband, Dr. C. Buchanan, and for the further consideration that the said C. Buchanan is putting valuable improvements upon the lot to be conveyed, I hereby give, transfer, and convey unto him, his heirs and assigns, a one-half interest in the following described property: [Here follows description.]

“To have, and to hold the one-half interest jointly with me in the above-described town lots, with the appurtenances thereunto belonging to the proper use and behalf of him, the said C. Buchanan, jointly with myself and as a tenant in common with me in the entire property, it being the property conveyed to me by my father, A. T. Hassel, on the 1st day of January, 1872, and recorded in Book M, page 306, in the register’s office of Wayne county, Tennessee. I hereby bind myself, my heirs and executors and administrators, to warrant and forever defend the title to the above-described town lots and each of them against the lawful claims of any and all persons or persons whatsoever, unto the said C. Buchanan and his said heirs and assigns forever.”

The privy examination of Mrs. Buchanan was duly taken to the deed by the county court clerk of Wayne county.

Thereupon Dr. Buchanan made improvements on said place, including the erection of a handsome dwelling

Montague v. Buchanan.

at a cost of \$3,500, and he and his wife occupied said dwelling continuously until her death in 1913.

Dr. and Mrs. Buchanan never had any children, but the defendant, Adyne Buchanan, a niece of Dr. Buchanan, was raised by Dr. and Mrs. Buchanan, and was living with her uncle, Dr. Buchanan, when this suit was instituted.

On March 31, 1915, Dr. Buchanan executed to the defendant Adyne Buchanan, a warranty deed to said two lots for the consideration of \$4,000, evidenced by deferred notes, none of which had been paid when this suit was brought.

On February 28, 1917, the bill was filed by the three sisters and heirs at law of Mrs. Buchanan against Adyne Buchanan seeking to eject her from said property, to recover rents, and to have the deed from Mrs. Buchanan to Dr. Buchanan, and the deed from Dr. Buchanan to the defendant, Adyne Buchanan, removed as clouds upon complainants' title.

The defendant, Adyne Buchanan, filed her answer as a cross-bill.

Dr. Buchanan was permitted to become a party defendant, and filed a petition as a cross-bill.

The complainants filed demurrers to said cross-bills, and, without undertaking to set out in detail these various pleadings, suffice it to say that the pleadings raise two questions that are determinative of the issues involved, viz.:

(1) Did the deed made by her father to Mrs. Buchanan vest in her a separate estate to the lots conveyed?

The chancellor so held, and it is from that holding the complainants appealed.

Montague v. Buchanan.

(2) Are the defendants under the facts set out in the answers and cross-bills and upon the equities asserted, entitled to recover for one-half of the enhanced value of the lots, by reason of the improvements placed thereon by C. Buchanan, or the entire enhancement in value, if the court should hold the deed to Mrs. Buchanan did not vest in her a separate estate?

This latter proposition was denied by the chancellor, and from that part of the decree the defendants have appealed.

We are constrained to hold that the deed by which Mrs. Buchanan held this property did not vest in her a separate estate. To hold otherwise would result in overruling *Houston v. Embry*, 1 Sneed, 480, a decision of this court made sixty-five years ago, and which has been cited approvingly by this court as late as 1915 in the case of *Travis v. Sitz*, 135 Tenn., 157, 185 S. W., 1075, L. R. A., 1917A, 671.

The same learned argument which solicitor for cross-complainant made in this case was made by the solicitor for the plaintiff in error in the case of *Houston v. Embry*, supra, as appears from the brief of solicitor for plaintiff in error, which precedes the opinion in that case.

The language of the deed in *Houston v. Embry*, supra, was the same as the language in the case we are considering, and, in reference to the construction thereof, the court, on page 489, says:

"After an examination of all the authorities to which we have had access, we are of opinion that the words 'to the only proper use and behoof of her, the said Joanna, . . . her heirs or assigns forever,' are wholly insufficient to create a trust for the separate

Montague v. Buchanan.

use of the complainant. This is a set form of words taken from the complicated and redundant precedents of conveyancing formerly in use, which has long been regarded, even in England, as wholly useless; and in this country, under our simple forms of conveyance, as a mere unmeaning, useless form. The words are inappropriate to the purpose of creating a trust for the separate use of a married woman; and from their use, therefore, no inference of such an intention can be deduced. . Words in themselves much more apt and significant have been held insufficient to give a separate estate."

It is also said that *Houston v. Embry*, supra, is impliedly overruled by *Gray v. Robb*, 4 Heisk 74, but, by comparing the language of the deeds in the two cases and the reasoning of the court relative thereto, they are distinguishable and not in conflict. In *Gray v. Robb*, the case of *Houston v. Embry*, supra, was relied on by the defendants, and had the court considered the latter case in conflict with their holding, they would likely have specifically made announcement to that effect in their opinion.

As to the right of the defendants under their cross-bill to recover for one-half of the enhanced value of the lots by reason of the improvements placed thereon by C. Buchanan, we think the chancellor was correct in holding that no such recovery could be had.

Learned counsel for the defendants concede that, under our authorities, as a general proposition, a husband cannot recover for improvements made on his wife's property, but counsel takes the position that the case at bar is stronger in its equities and different as

Montague v. Buchanan.

to its facts from the cases relied upon by the complainants. But learned counsel has not cited the court to any authorities that would take this case out of the general rule, and we have been unable to find any such cases, and we do not see that this works any greater hardship than was suffered by the complainants in the cases of *O'Malley v. Coughlin*, 3 Tenn. Ch., 431, and *Sexton v. Alberti*, 10 Lea, 452. In *O'Malley v. Coughlin* the court said:

"It has long been settled, in this state, that the husband cannot, either by his own act or by contract, acquire or give a lien on his wife's land for improvements put thereon with her knowledge. The reason is that by an elementary principle of the common law, which has always been in force in this state, and which a court of equity cannot abrogate, the legal existence of the wife is merged in and incorporated with that of the husband, and she can therefore make no contract, give no consent, nor bind herself by acquiescence in regard to such improvements."

And in *Sexton v. Alberti* the court said:

"It would seem to follow, inevitably, if her contract for building the house was void, and her promise to pay for it equally a nullity, that no lien could arise from these acts by which her property could be in any way affected. Contracts which the party has no power to make cannot be the basis of legal obligation, nor could legal obligation grow out of such engagements, *ex contractu*. . . .

"The liability of the land to the lien would seem to be met by the fact that under our law she could only dispose of or convey it by conveyance in connection with her husband, and after privy examination before certain

Montague v. Buchanan.

officers, as prescribed by our statutes. While a lien is not a right to land, nor an interest in land, as such, but a charge fixed upon it by law or contract, still it would seem an incongruity to hold that the wife could . . . indirectly contract for a result by which her land might be conveyed or disposed of, against her will, when she could not have done so directly, or except under prescribed forms, which have not been complied with."

It results that the decree of the chancellor will be reversed, in so far as it holds that Mrs. Buchanan held the lots as a separate estate, and affirmed, in holding that cross-complainants cannot recover on account of improvements placed on the lots by Dr. Buchanan. The cross-bills of the defendants will be dismissed. The deed from Mrs. Buchanan to Dr. Buchanan, and the deed from Dr. Buchanan to Adyne Buchanan, will be removed as clouds, and the defendants will pay the costs of the appeal. The costs in the lower court will be paid as decreed by the chancellor. Writ of possession will issue to put the complainants into possession of said property.

Stanton v. Herbert & Sons.

MRS ELIZABETH STANTON *et al.* v. T. L. HERBERT & SONS
et al.

(Nashville. December Term, 1918.)

1. DEEDS. Exception. Reservation. Distinguished.

A clause that the conveyance is subject to a right of the grantors to remove sand from the land is not an exception with respect to part of the thing granted, but a reservation to the grantors: such right not formerly existing separately, but having been called into being by the deed. (*Post*, pp. 443, 444.)

2. EASEMENTS. Reservations. Incorporeal hereditament.

A reservation of the right to remove sand in a deed as "an easement, right or privilege," with rights necessary for such use, does not create an exclusive right passing an interest in land, corporeal, assignable, and divisible, but an incorporeal hereditament, assignable but not divisible. (*Post*, pp. 444-448.)

Cases cited and approved: Earl of Huntington v. Lord Mountjoy, 4 Leo., 147; Doe v. Wood, 2 Barn. & Ald., 724; Gloninger v. Franklin Coal Co., 55 Pa., 9; Johnstown Iron Co. v. Cambria Iron Co., 32 Pa., 241; Caldwell v. Fulton, 31 Pa., 475; Massot v. Moses, 3 S. C., 168; Post v. Pearsall, 22 Wend. (N. Y.), 425; Boatman v. Lasley, 23 Ohio St., 614; Hinicum Fishing Co. v. Carter, 61 Pa., 21.

Cases cited and distinguished: Cheatham v. Williams, 4 East., 469; Duke of Sutherland v. Heathcote, 1 Ch., 475.

3. EASEMENTS. Assignment. Right to take sand. Construction and operation.

Where grantors assigned an assignable but indivisible right to take sand in the deed to three contractors building a large plant and using more sand than grantors would, such attempted division destroyed the reservation and gave the contractors no right to take sand. (*Post*. pp. 448-453.)

Cases cited and approved: Burton's Case, 6 Co., 1; Turringham's

Stanton v. Herbert & Sons.

Case, 4 Co., 37; Leyman v. Abeel, 16 Johns., 30; Chandler v. Hart, 161 Cal., 405.

Cases cited and distinguished: Van Renselaer v. Radcliff, 10 Wend. (N. Y.), 639; Luttrell's Case, 4 Co., 87.

4. NAVIGABLE WATERS. Islands. Ownership. Taking sand. Damages.

The owner of an island in a navigable river cannot recover for the value of sand wrongfully taken from land submerged by the construction of a government dam; such land being government property, taken by eminent domain, for which the government was liable in damages. (*Post*, pp. 453-455.)

Acts cited and construed: Acts 1899, ch. 425, sec. 10.

Cases cited and approved: Reelfoot Lake Case, 127 Tenn., 575; United States v. Lynah, 188 U. S., 445; United States v. Great Falls Mfg. Co., 112 U. S., 645.

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.
HON. JAS. B. NEMAN, Chancellor.

JOSEPH R. WEST and JORDAN STOKES, JR., for appellants.

THOS. H. MALONE, C. C. TRABUE and MANIER & CROUCH, for appellees.

MR. JUSTICE GREEN delivered the opinion of the Court.

The bill in this case was filed by the complainants to enjoin the defendants from removing sand and gravel from Hill's Island in the Cumberland river, about twenty miles above Nashville, and to recover damages.

Stanton v. Herbert & Sons.

This island is the property of the complainants, and the defendants are building contractors at Nashville and were removing sand and gravel from said island and the water adjacent thereto for use in contracts which they had for the erection of buildings at the powder plant.

A demurrer coupled with an answer was filed by the defendants. The chancellor sustained the demurrer and dismissed the bill, and the complainants have appealed to this court.

Hill's Island was formerly the property of Mrs. Mary Nolan and William E. Jordan. On June 12, 1911, they conveyed to complainants, Mrs. Elizabeth Stanton and Rush Hawes. Said deed described the property and was in the usual form of a warranty deed, except that in the *habendum* clause there were these words:

"Subject, however, to an easement, right, or privilege, to remove sand from said property for a period of ten years from the date of this conveyance, and such rights, privileges, and easements as may be necessary and proper for such use which easements, privileges, and rights are hereby retained by the grantors herein."

It was averred in the bill that the grantors had attempted to assign their right to remove sand from said island to their codefendants, W. T. Hardison & Son, T. L. Herbert & Sons, and the Nashville Builders' Supply Company, and that the said codefendants, along with Jordan, were removing tremendous quantities of sand and gravel from said island and the water adjacent thereto, for use in their powder plant contracts as aforesaid, and that they were very seriously damaging the complainant's property. It was alleged that these

Stanton v. Herbert & Sons.

codefendants were acting illegally in the premises, since the complainants were advised that the reservation or exception of the right to remove sand contained in said deed was void for uncertainty, and for that it was contradictory to and destructive of the grant, and that, at any rate, the right of the original grantor to remove sand was personal and not assignable nor divisible.

All these propositions of law were challenged by the demurrer, and the allegations of fact contained in the bill were rather generally denied by the answer.

As is apparent from the foregoing statement, numerous questions are raised in this case, and they have been debated with much learning and ability. It will not be necessary to consider them all. A determination of the nature of the right or interest reserved in this property by the original grantors simplifies the solution of the case.

Although it is perhaps not a matter of great importance, we may observe that we think the right of the grantors to remove sand from this island arose under their deed by way of reservation and not by way of exception.

"A reservation is a clause in a deed, whereby the grantor reserves some new thing to himself, issuing out of the thing granted, and not *in esse* before; but an exception is always of a part of the thing granted, or out of the general words and description in the grant."

4 Kent. Com., star page 468.

The rule that a reservation must be something not *in esse* is not to be understood as preventing the reservation of some right which the grantor previously

Stanton v. Herbert & Sons.

enjoyed. The right reserved may have previously existed as an incident of the title to the land. To be the subject of a reservation, such a right need only be separated from the ownership of the land. Thus separated, as an independent right, it is new. It did not formerly exist separately, but was called into being by the reservation in the deed. 8. R. C. L., p. 1091.

We think the right to remove sand reserved to the grantors under this deed was not exclusive. There is nothing in the language used in the deed to indicate that such right was intended to be exclusive. The right was described "as an easement, right, or privilege." The indefinite article "an" was used, not "the." In addition to the right to remove sand, only such other rights and privileges were reserved as were necessary to effectuate the principal right. There is nothing to show an intention to deprive Stanton and Hawes of the right to remove sand themselves. Under the authorities, the presumption is against an exclusive grant or reservation of this nature.

The first case dealing with the question involved here was that of *Earl of Huntington v. Lord Mountjoy*, 4 Leo., 147; 1 And., 307; and Godb., 18.

This case has been variously reported, and not always to the same effect; but the case has always been understood to have declared that a mere grant of liberty to dig coals did not confer on the grantees an exclusive right to dig them.

In *Chetham v. Williams*, 4 East., 469, Lord ELLENBOROUGH said: "No case can be named where one who has only a liberty of digging for coals in another's soil has an exclusive right to the coals, so as to enable

Stanton v. Herbert & Sons.

him to maintain trover against the owner of the estate for coals raised by him."

In *Doe v. Wood*, 2 Barn. & Ald., 724, it was held that the grant by deed of liberty to search for, work, and dispose of minerals was in effect a license and did not operate as a grant of the minerals, nor did it entitle the licensees who were working certain mines to bring ejectment against persons working another mine within the area covered by the license. The right of the grantee in this case was described as a mere "incorporeal privilege."

In *Duke of Sutherland v. Heathcote* (1892), 1 Ch. 475, there was a reservation of a right to dig and carry away coal quite similar to the reservation of the right to dig sand, in the deed before us. Lord LINDLEY said of the grantors:

"They reserved a profit *a prendre*, an incorporeal hereditament, not a mere personal license. . . . A profit *a prendre* is a right to take something off another person's land; such a right does not prevent the owner from taking the same sort of thing from off his own land; the first right may limit, but does not exclude the second. An exclusive right to all the profit of a particular kind can no doubt be granted; but such a right cannot be inferred from the language when it is not clear and explicit."

In *Gloninger v. Franklin Coal Co.*, 55 Pa., 9, 93 Am. Dec., 720, there was a deed granting "the free right to dig coal at the coal bed under the foot of the mountain on my lot. No. 22, in third division of lands in Wilkes-Barre, with the privilege freely to carry the coal . . . to and from said coal bed through my land at all times

Stanton v. Herbert & Sons.

hereafter, doing as little damage as may be, in the uses aforesaid." It was held that the language used created an incorporeal hereditament and not an exclusive right to all the coal.

In *Johnstown Iron Co. v. Cambria Iron Co.*, 32 Pa. 241, 72 Am. Dec., 783, there was a grant of "privilege of raising iron ore in his fields at twenty-five cents per ton, and also the privilege of raising the iron ore on his woodland, after his contract with McGill & McKiernan is filled, at the same price (twenty-five cents per ton), and to give the privilege to none else." It was held that such a right was not exclusive in the grantees, but was to be enjoyed in common with the grantor, his heirs and assigns.

It is obvious from these authorities that a mere grant of the right or privilege of removing minerals from the land of another does not in itself create an exclusive right or privilege in the grantees. Such cases are to be distinguished from those in which there is a grant of all the minerals in certain property or a grant of an exclusive right to remove the minerals.

The latter class of cases is illustrated by *Caldwell v. Fulton*, 81 Pa., 475, 72 Am. Dec., 760. The language used in the grant there considered was construed to mean that the grantee was entitled to take all the coal in the land. The deed was held to be a conveyance of the coal itself. It was said that coal and minerals in place are land, and that it was no longer to be doubted that they were subject to conveyance as land. The deed, therefore, was held to pass an interest in the land—a corporeal interest.

Stanton v. Herbert & Sons.

Likewise in the case of *Massot v. Moses*, 3 S. C., 168, 16 Am. Rep., 697 there was a conveyance held to pass all the phosphates on a particular tract of land, and it was declared that this created an exclusive interest in such minerals in the grantee. A part of the land itself was conveyed. This case of *Massot v. Moses* is a learned review of the authorities on this subject and a very clear statement of the established rules of law, although not so easy to follow in its application of the principles stated to the facts of the particular case.

The distinction between a conveyance of all the minerals in a particular tract of land, or an exclusive right to the minerals, and a deed granting a right to remove minerals from land by the grantee to be enjoyed in common with the grantor, appears in numerous cases collected in notes in 26 L. R. A. (N. S.), 614, and 18 L. R. A., 491. In many cases the land itself is denied, which, of course, confers an exclusive right to the minerals.

The effect of this distinction is this: If all the minerals are conveyed, or an exclusive right thereto, an interest in the land passes. This is a corporeal interest, which may be assigned, divided, or dealt with as any other interest in land. If, under the grant, there passes only a right to remove minerals in common with the grantor, an incorporeal hereditament results.

Such an incorporeal hereditament is referred to in some of the cases as a license, and in some of them as an easement in gross. It is not, however, a revocable license, and it is not an easement that is personal to the grantee. It is a profit *a prendre*, and under the

Stanton v. Herbert & Sons.

weight of authority a profit *a prendre* is both inheritable and assignable. *Post v. Pearsall*, 22 Wend. (N. Y.), 425; *Boatman v. Lasley*, 23 Ohio St., 614; *Tinicum Fishing Co. v. Carter*, 61 Pa., 21, 100 Am. Dec., 597.

While a profit *a prendre* is assignable, it is not divisible. This rule is applicable, to mining cases and is recognized in *Caldwell v. Fulton*, supra, and in *Massot v. Moses*, supra, and applied in Lord Mountjoy's Case.

Such an incorporeal hereditament is similar in legal contemplation to commons of estovers or fishery. These were held to be indivisible, and, if an attempt to divide or apportion them was made, a destruction of the right resulted.

In the case before us, it appears that the grantors undertook to assign rights to remove sand from Hill's Island to W. T. Hardison & Son, T. L. Herbert & Sons, and Nashville Builders' Supply Co. In the answer filed by these defendants, they justify their removal of sand from the island on the ground that they are assignees of the reserved rights of the grantors in the deed to these complainants. It is not a fair construction of the pleadings to conclude that these defendants were users of a "common stock," as said in Lord Mountjoy's Case, or were engaged in any joint enterprise. They were separate contractors, and each had contracts with reference to the building of the powder plant. They claim as "assignees" of the grantors, not as "assignee."

In *Van Rensselaer v. Radcliff*, 10 Wend. (N. Y.), 639, 25 Am. Dec., 582, it was held that a common of estovers was not apportionable, and, if the tract to which

Stanton v. Herbert & Sons.

the common was appurtenant was conveyed to different persons, the common was extinguished.

The court in this case reviewed some English authorities, and compiled an interesting statement of the reasons for the rule preventing the division of incorporeal hereditaments of this nature. From this case we quote as follows:

"The authorities also inform us that common of estovers cannot be apportioned. Lord Coke says, 'If a man have reasonable estovers, as housebote, etc., appendant to his freehold, they are so entire that they shall not be divided between coparceners.' Co. Lit., 164, b; 3 Cru., 93. Lord Mountjoy's case is there stated, which was that of common of turbary, and it was resolved that he could not assign his interest to one or more, for that might work a prejudice and surcharge to the tenant of the land, and, therefore, if such an inheritance descended to parceners, it cannot be divided. In *Luttrell's Case*, 4 Co., 87, Lord Coke says: 'So, if a man has estovers by grant or prescription to his house, although he alters the rooms and chambers of this house, as to make a parlor where it was the hall, or the hall where the parlor was, and the like alterations of the qualities and not of the house itself, and without making new chimneys, by which no prejudice accrues to the owner of the wood, it is not any destruction of the prescription, for then many prescriptions would be destroyed; and although he builds a new chimney or makes a new addition to his old house, by that he shall not lose his prescription, but he cannot employ or spend any of his estovers in the new chimneys, or in the part newly added.' 3 Cru., 89. Estovers appurtenant to a

Stanton v. Herbert & Sons.

house cannot be separated from the house; but must be spent on the house. 3 Cru., 89; Plowd., 382. These authorities seem to be express that common of estovers cannot be apportioned, and for the reason that thereby the land out of which the estovers are to be taken would be surcharged. If, for instance, estovers are granted as belonging to a farm of two hundred acres, so long as this is one farm, there is but one house and probably not more than two chimneys; but if this farm is divided into two, another house becomes necessary, and double the number of chimneys must be supplied. This would be an injury to the lord. So also of fences and buildings; by dividing the farm into two, more fences and buildings become necessary, and if both are to be supplied from the woods of the lord, an increased quantity would be taken, where, by the grant itself, only estovers for one farm were allowed. As these estovers cannot be apportioned, neither of the tenants among whom the farm is divided can have them, and therefore they become extinguished. Common of estovers must be considered as an entire thing, not to be divided; and in case of a common person, if an entire thing be divided or extinguished in part by the act of the party, it is an extinguishment of the whole; but otherwise where it is by the act of God or the law. 11 Vin., 567, pl., 4, tit. Extinguishment, P; *Bruerton's Case*, 6 Co., 1; *Turringham's Case*, 4 Co., 37.

"Lord Coke also says, 'If a man have reasonable estovers, as housebote, heybote, etc., appendant to his freehold, they are so entire as they shall not be divided between coparceners.' Co. Lit., 164 b. In answer to the question, What shall become of such inheritances? he

Stanton v. Herbert & Sons.

says it appears by the books that the eldest shall have them, and the others a contribution; but if no other property descended from which contribution could be had, then the parceners should have alternate enjoyment, or, in case of piscary, one shall have the first fish and another the second; and so of a toll-dish, where the hereditament was the toll of a mill."

A like result had previously been reached by the New York court in *Leyman v. Abeel*, 16 Johns., 30; "and this," says Chancellor KENT, "upon an old and just principle of law to prevent the land from being doubly or trebly charged. In accordance with the case of *Earl of Huntington v. Lord Mountjoy*, it was held that a common in gross and uncertain as the right to cut wood and dig turf, might be assigned, but it could not be aliened in such way as to give the entire right to several persons to be enjoyed by them separately." 3 Kent. Com., p. 408.

From the authorities discussed it is manifest that the grantors by the reservation contained in their deed only obtained a right in common with their grantees to remove sand from this island. Such a right was a mere incorporeal hereditament, and could not be divided as here undertaken. The attempted division has destroyed the reservation. The assignees of the grantors, therefore, were not entitled to this sand.

We cannot undertake a further review of the authorities cited by counsel. We are content to follow the courts of England and of Pennsylvania. These courts have largely developed the law relating to mines and mineral rights, in so far as the subject is not controlled by statute, and their decisions on this subject

Stanton v. Herbert & Sons.

are entitled to the greatest consideration owing to the magnitude of such interests in these jurisdictions, to say nothing of the ability of the judges.

Indeed, there is little conflict of authority. Cases relied on by the defendants are, almost without exception, cases in which there was an exclusive right considered, and, as heretofore seen, such a right is both assignable and divisible. It is an interest in the land.

The case of *Chandler v. Hart*, 161 Cal., 405, 119 Pac., 516, Ann. Cas., 1913B, 1094, is not in point. It was there held that a lease of oil rights might be divided, but there was a demise of the land itself with the exclusive right to take the oil. The court distinguishes the case from Lord Mountjoy's Case, and those following the earlier authority, on the ground that the grantee in the California case had the exclusive right to remove oil, and on the other ground that the development of oil lands differs in character from the development of mines. *Chandler v. Hart* was properly decided on these facts, and we see nothing in the reasoning of the court that conflicts with what has been heretofore said. We do not understand this case as disapproving Lord Mountjoy's Case.

The justice of the rule against the apportionment or division of an incorporeal hereditament, such as this, is strikingly illustrated in the case before us. The complainants here might very well have agreed that their immediate grantors, one of whom was a contractor, should reserve enough sand for use in their own business. The grantors, however, undertook to assign this right to three of the largest contractors in Nashville, who were engaged in the building of the largest

Stanton v. Herbert & Sons.

plant in the United States—a plant demanded by the exigencies of the great war, and designed by the government to manufacture enough powder to supply the needs of the United States and all its Allies. To permit the grantor to apportion his right to sand among three such contractors engaged in such an enterprise would have required quantities of sand never dreamed of by the parties at the time this deed was made. It would, indeed, have been a surcharge of the land.

It follows that the Chancellor was in error in holding that complainants were not entitled to injunctive relief.

Coming to the question of damages, it will not be denied, in the light of the foregoing, that complainants are entitled to recover the value of the sand and gravel taken from the island above present low water mark.

The level of the water has, however, been raised on this island of recent years by the construction of a lock and dam by the government at a point in the river shortly below. So that a portion of the island is now submerged and in the channel of the river at low water, which at that stage of the river was formerly dry land and the property of these complainants.

Complainants insist that they did not lose title to their property thus covered by water and are entitled to recover for sand and gravel dredged from that portion of the island once above low water, but over which the river flows at all stages since the building of the dam. They rely on *Reelfoot Lake Case*, 127 Tenn., 575, 158 S. W., 746. Reelfoot Lake was formed by an earthquake. A large body of land sank below the level of the earth and was covered by water and a navigable lake was formed. Some of this land had

Stanton v. Herbert & Sons.

been granted by the state prior to the earthquake, and this court held that the title of the land was not affected by the formation of the lake.

We think the Reelfoot Lake Case is not in point here. The land there was merely submerged by an avulsion. In the case in hand there was a submergence and a taking of the land by the federal government in the exercise of the power of eminent domain for purposes of navigation. For this taking the government was liable in damages. *United States v. Lynah*, 188 U. S., 445, 23 Sup. Ct., 349, 47 L. Ed., 539; *United States v. Great Falls Mfg. Co.*, 112 U. S., 645, 5 Sup. Ct. 306 28 L. Ed., 846.

We think this taking was for a purpose inconsistent with the retention of title by the owners to the submerged sand and gravel as such. The raising of the level of the river here brought this sand and gravel into the channel of a navigable stream. Any excavation in such waters is forbidden by act of Congress (Act March 3, 1899, chapter 425, section 10, 30 Stat. L., 1151, Fed. Stat. Ann., vol. 6, p. 813 [U. S. Comp. St. section 9910]).

We are of opinion that complainants are not entitled to recover for the value of sand and gravel removed, which they themselves had no right to remove, but could only have gotten out by permission of the government authorities.

Other items of damages are claimed by the complainants, but these matters have not been fully presented, and perhaps could not be intelligently discussed until proof is taken. At all events, we are unwilling to

Stanton v. Herbert & Sons.

attempt a disposition of these questions unless the case be further developed.

The case will be remanded for further proceedings, not inconsistent with this opinion, with leave to complainants to set up and recover all damages to which they may be entitled under the proof and the law.

Defendants will pay the costs of this court. The costs below will be adjudged by the Chancellor.

State v. Nashville Baseball Ass'n.

THE STATE *v.* NASHVILLE BASEBALL ASS'N.

(Nashville. December Term, 1918.)

1. SUNDAY. Prohibition of baseball. Statute.

Shannon's Code, section 3029 (Acts 1803, chapter 47, section 1), making it an offense for any merchant, artificer, tradesman, farmer, or other person to exercise any of the common avocations of life on Sunday, etc., does not prohibit the playing of professional baseball on Sunday; the game not having been in existence when the statute was enacted. (*Post*, pp. 457-465.)

Acts cited and construed: Acts 1803, ch. 47, sec. 1.

Cases cited and approved: State *v.* Prather, 79 Kan. 513; McCreary *v.* First National Bank, 109 Tenn., 128; Stockley *v.* Cissna, 119 Fed., 812; Goodwin *v.* Thompson, 83 Tenn., 209; Ex parte Neet, 157 Mo., 527.

Cases cited and distinguished: Territory *v.* Davenport, 17 N. M., 214; Ex parte Roquemore, 60 Tex. Cr. 282.

Code cited and construed: Sec. 3029 (S.).

2. STATUTES. Contemporaneous construction.

Shannon's Code, section 3029 (Acts 1803, chapter 47, section 1), making it an offense for any merchant, artificer, tradesman, farmer, or other person to exercise any of the common avocations of life on Sunday, etc., having been construed by the legislature, the legal profession, and the public generally not to prohibit the playing of professional baseball on Sunday, will not be held to do so by the supreme court. (*Post*, pp. 465, 466.)

3. SUNDAY. Prohibition of professional baseball. Statute.

Shannon's Code, section 3031 (Acts 1803, chapter 47, section 2), subjecting to the same proceedings and penalty as those who work on the Sabbath any person who shall hunt, fish, or play at any game of sport on Sunday, does not prohibit the playing of pro-

State v. Nashville Baseball Ass'n.

fessional baseball; the game not having been in existence when the statute was enacted. (*Post*, pp. 466-468.)

Case cited and approved: *Graham v. State*, 134 Tenn., 285.
Code cited and construed: Sec. 3031(S.).

FROM DAVIDSON.

Appeal from the Circuit Court of Davidson County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
HON. R. E. BLAKE, Special Judge.

FRANK M. THOMPSON, Attorney-General, and JAMES L. WATTS, for the State.

CHERRY & STEGER, for defendants.

MR. JUSTICE McKINNEY delivered the opinion of the Court.

The petition filed in this case sought to enjoin the defendant from playing baseball on Sunday, in Tennessee, and to have its charter forfeited.

The circuit judge dismissed the petition, and on appeal the court of civil appeals reversed the lower court and perpetually enjoined the defendant from playing ball on Sunday, in Tennessee, but declined to decree a forfeiture of its charter.

The case is before us by petition for writ of *certiorari*.

The court of civil appeals held that it was unlawful to play baseball in Tennessee on Sunday, and based

State v. Nashville Baseball Ass'n.

its holding on chapter 47, section 1, of the Acts of 1803, section 3029 of Shannon's Code, which is as follows:

"If any merchant, artificer, tradesman, farmer, or other person shall be guilty of doing or exercising any of the common avocations of life, or of causing or permitting the same to be done by his children or servants, acts of real necessity or charity excepted, on Sunday, he shall, on due conviction thereof before any justice of the peace of the county, forfeit and pay three dollars, one-half to the person who will sue for the same, the other half for the use of the county."

It, therefore, becomes necessary for us to construe this statute with a view of determining whether the same applies to playing baseball.

In 7 Corpus Juris, p. 932, note (a), the origin of baseball is thus stated:

"In a prosecution for playing baseball on Sunday, brought under a statute providing that persons convicted of horseracing, cockfighting, or playing at cards or any game of any kind on Sunday should be guilty of a misdemeanor, one of the reasons suggested for holding that the statute was not to indicate baseball was that when the statute was adopted the game was unknown. In referring to this suggestion the court said: 'Until very recently there has been more or less controversy as to the early history and origin of baseball, some contending that it is only a modified form of the English game of rounders. In order to settle the dispute a special baseball commission was appointed, consisting of a number of eminent men. Their report was published in 1907, and the commission, after full investigation, unanimously decided that baseball is dis-

State v. Nashville Baseball Ass'n.

tinctively an American game; that it originated in Cooperstown, New York, in 1839, and that the first scheme for playing it was the invention of Gen. Abner Doubleday, who afterwards graduated from West Point and achieved honorable distinction in the Civil War. The rules of the game as first published by the Knickerbocker Club of New York in 1845 differ only in a few minor details from those of the modern game. Baseball was first played by regular clubs in 1845, and while it had begun to attract attention in the '50's it did not become a common form of sport or exercise and was not generally played until 1865. The first professional club was organized for playing it in 1868." *State v. Prather*, 79 Kan., 513, 100 Pac., 57, 21 L. R. A. (N. S.), 23, 131 Am. St. Rep., 339.

So that, it appears that, at the time of the passage of the act in question, the game of baseball had not been invented and was unknown, and hence the legislature could not possibly have had such a game in mind at the time it passed said act.

"Intention is the cardinal rule, in the construction of statutes." 11 Encyclopedic Digest, 529, where many cases are cited.

"It is a settled rule that penal statutes are to be construed strictly, and are not to be extended beyond the plain letter of the law." *McCreary v. First National Bank*, 109 Tenn., 128, 70 S. W., 821.

Now, what was the legislative intent in the passage of this statute? The statute says, "If any merchant, artificer, tradesman, farmer, or other person shall be guilty of doing or exercising any of the common avocations of life," etc. Evidently the legislature intended to in-

State v. Nashville Baseball Ass'n.

hibit any one from "exercising any of the common avocations of life on Sunday," and unquestionably it referred to, and the legislature had in mind, the common avocations of life engaged in by the people at that time. The legislature did not undertake to enumerate them—it was unnecessary, as they were commonly known and understood by the people, but they indicated what they had in mind by specifically mentioning merchandising; one who does artistic work, a mechanic or manufacturer; a trader and a farmer, and, speaking historically, this practically included all of the common avocations of that day.

If you undertake to extend the statute to the many avocations that have since come into vogue, and which the legislature could not have had in mind, you are confronted with very serious problems, the result being that a very large number of our industrial and pleasurable operators are persistent violators of the statute. The thousands of men engaged in operating our railroads, traction companies, taxicabs, publishers of Sunday newspapers, the boys who vend these papers, boot-blacks, musicians whose avocations as members of a band play in our city parks on Sunday afternoon for the entertainment of the large number of people who frequent such places for fresh air and sunshine, and even the professional musician, who sings as an avocation, and who hires himself to one of our church choirs and sings in church Sunday after Sunday—all of these are violators of the statute, and many other examples could be cited.

So that, when you undertake to give this statute a broader meaning than was intended by its framers, and

State v. Nashville Baseball Ass'n.

than a strict construction entitles it to, you are making law violators out of many of our citizens, and they are innocent offenders at that; and, furthermore, the question as to whether a particular act is a violation of the statute will depend largely on the personal views of the particular jurist making the application. One might consider it a violation while another would not; and the result would be that the law would not be uniform, fixed and certain.

The state of New Mexico had a statute (passed in 1897 [Comp. Laws, section 1368]) reading as follows:

"Any person or persons who shall be found on the first day of the week engaged in any sports or in horseracing, cockfighting, etc., or engaged in any labor, except works of necessity, charity or mercy, shall be punished."

"In construing this act, in *Territory v. Davenport*, 17 N. M., 214, 124 Pac., 795, 41 L. R. A. (N. S.), 407, the court said:

"By the use of the words 'horseracing and cockfighting' the legislature pointed out the class of sports which it intended to prohibit, and baseball, not being in the same class of sports, is not prohibited."

And so, in the instant case, you could hardly classify baseball playing with merchandising, manufacturing, trading, and farming.

The state of Texas has a statute (Pen. Code 1895, art. 199) as follows:

"Any merchant, grocer, or dealer in wares or merchandise, or trader in any business," etc., "or the proprietor of any place of public amusement, . . . who shall sell, barter or permit his place of business or

State v. Nashville Baseball Ass'n.

place of public amusement to be open for the purpose of traffic or public amusement on Sunday, shall be fined," etc.

The law further defines a place of public amusement to include circuses, theaters, variety theaters, and "such other amusements as are exhibited and for which an admission fee is charged."

A game of baseball was played in a baseball park on Sunday, and an admission fee was charged. An indictment followed and it was contended that the language used included baseball. The doctrine of *eiusdem generis* was invoked. But the supreme court said:

"It is elementary before a citizen can be punished as a criminal that the offense must clearly be defined by the statute, and an appropriate penalty affixed. . . . Further, it is a rule of construction well known that, in undertaking to fix and place the meaning upon statutes, we should do so in the light of contemporaneous history, and in reference to the habits and activities of our people. It is known, of course, that baseball is the most generally practiced, patronized, and approved of all the games of exercise, and that it is the cleanest and fairest of all manly sports and excites rivalry in the youths in our land, and that every village and hamlet has its favorite nine, and . . . many ambitious youths who dream of the day when they shall equal if not excel Matthewson, Speaker, Cobb, Napoleon, Lajoie, and Honus Wagner. It is also well known that for many years, in many of our largest cities, baseball on Sunday has been not only frequently, but continuously, played, where an admission fee is charged. Now it would have seemed, in the light of these facts, that, if

State v. Nashville Baseball Ass'n.

it had been the legislative intent to condemn this form of amusement and include it within the statute under consideration, it would have been an easy matter to have done so in express words, and not left the matter at least clouded in doubt. Again, it is worthy to be remembered, as a part of the political history of the times, that many efforts have been made within the last few years in the legislature to make the playing of baseball on Sunday an offense without success. It would seem that, if it were already an offense, these efforts would not have been put forth." *Ex parte Roquemore*, 60 Tex. Cr., 282, 131 S. W., 1101, 32 L. R. A. (N. S.), 1186.

The question of legislative intent is forcefully illustrated in the case of *Stockley v. Cissna*, 119 Fed., 812, 56 C. C. A., 324, and approved by this court in the same styled case in 119 Tenn., 135, 104 S. W., 792.

The facts of the Stockley Case, briefly, are these: By an avulsion in 1876, the Mississippi river left its bed, on the Tennessee side, and flowed through a new channel. A few years later this old bed became dry land. In 1901 Stockley, by virtue of chapter 20 of the Acts of 1847-48, entered and obtained a grant to a part of this old bed, which was the property of the State of Tennessee when the act of 1847 was passed. The act of 1847 provided that after September 1, 1849, any person might enter any of the vacant and unappropriated lands in the State. This particular land had belonged to the State all these years, and was vacant and unappropriated at the time Stockley made his entry, but the court held that Stockley acquired no title; that the land was not subject to entry and grant under the act of 1847,

State v. Nashville Baseball Ass'n.

although the property of the State, for the reason, that this land was covered by the water of the river at the time the act was passed, and that this land was not in the mind of the legislature at the time said act was enacted.

Judge LURTON, speaking for the court, said:

"The situation is one which could not have been reasonably contemplated by the lawmaker, when providing for the ordinary vacant lands belonging to the public domain. The lands in question were not at the date of the act of 1847 within the meaning and purview of the makers of the law, because it was the policy and purpose of the state [*Goodwin v. Thampson*, 15 Lea, 209, 54 Am. Rep., 410] to reserve for the public use the beds of such navigable rivers."

"Not having been within the meaning of the Tennessee acts which provided for the disposition of the unoccupied and ungranted land of the State at the time these acts were passed, the *locus in quo* had not been brought within the terms of these acts by the subsequent extraordinary physical change which had occurred. The dry river bed is public property, held by the State for public purposes, and some further legislation by the State is necessary before such a property will become open to private ownership."

And so in the case we are considering further legislation is necessary in order to deal with a state of affairs that did not exist at the time of the passage of the act of 1803.

When Stockley obtained his grant in 1901, the act of 1847 was still in force. If this latter act did not apply to the land entered by Stockley, because not

State v. Nashville Baseball Ass'n.

within the contemplation of the legislature, neither did the act of 1803 apply to baseball, because baseball was not in the mind of the legislature when the act was passed.

In the State of Missouri there was a statute relating to work and labor and the playing of games on Sunday, under which a man was indicted for playing baseball on Sunday, and the court said:

"Section 2242, Revised Statutes 1899, has been on the statute books of Missouri, in exactly the same words, ever since 1835 . . . Playing a game of baseball on Sunday . . . could not have been in the minds of the lawmakers when this provision of law was enacted in 1835, for the very simple reason that such a game was wholly unknown to art at that time." *Ex parte Neet*, 157 Mo., 527, 57 S. W., 1025, 80 Am. St. Rep., 638.

Kansas passed a statute in 1855 forbidding the playing "of games of any kind" on Sunday. The supreme court held that the statute did not apply to baseball, and, referring to the Missouri holding, said:

"The same reason applies with almost as much force to our statute . . . adopted in 1855." *State v. Prather*, 79 Kan., 513, 100 Pac., 57, 21 L. R. A. (N. S.), 23, 131 Am. St. Rep., 339.

We have not been furnished, and have been unable to find, a single case holding a statute of this character, passed prior to the date that baseball became known, applicable. And even as to similar statutes passed in recent years the weight of authority seems to hold that they do not apply to baseball.

There is another potent reason why the statute does not apply. This act was passed one hundred and sixteen

State v. Nashville Baseball Ass'n.

years ago, and no attempt has been made to apply it to baseball until very recently. The legislature, the legal profession, and the public generally seem to have understood that it had no application to baseball, and in 1885 an act was passed by the legislature making Sunday ball playing a misdemeanor, which act was declared unconstitutional by this court. Both before and since that time attempts have been made to have the legislature enact such a law, but without avail, which is a recognition of the fact that the act of 1803 does not prohibit the playing of baseball on Sunday.

It is the duty of this court to interpret and enforce laws and not to make them, that being the province of the legislature, and, if the legislature thinks that the playing of baseball on Sunday is injurious to the morals or welfare of the public, they can make Sunday ball playing prohibitive.

The second section of chapter 47 of the Acts of 1803, Shannon's Code, section 3031, is as follows:

"Any person who shall hunt, fish, or play at any game of sport, or be drunk on Sunday as aforesaid, shall be subject to the same proceedings, and liable to the same penalties, as those who work on the Sabbath."

The court of civil appeals did not rest its decision on this section of the act, and the State has not raised this question by writ of *certiorari*. However, what we have said as to the other section applies as well to this one. "Play any game of sport" did not include baseball, because it was unknown at the time, and was not within the contemplation of the legislature.

The games of sport common in those days were horse-racing, cockfighting, and gambling with cards, and

State v. Nashville Baseball Ass'n.

most of the statutes passed one hundred years ago, specifically mentioned these three things. This provision of the statute evidently was not intended to apply to every little innocent game. Although, on the statute book for one hundred and sixteen years, we have never heard of any insistence being made that the statute prohibited such games as marbles, checkers, tennis, croquet, golf, proverbs, Bible games, and many other innocent games that could be enumerated. From the only authorities that we have been able to find it appears that similar statutes have always been construed as applying to wagering or gambling games. Strange to say that this provision of the act, although a very ancient one, has never been construed by this court, at least in a published opinion.

It is insisted, however, that this court took a contrary view in the case of *Graham v. State*, 134 Tenn., 285. 183 S. W., 983. In that case it seems to have been taken for granted that the statute applied, and the only question raised was one of jurisdiction, it being insisted that, under the statute, justices of the peace had exclusive jurisdiction, and the question which has been raised, and which we have been considering in this case, was not invoked in that case. However, that case can be distinguished from this one. The gravamen of the offense in the Graham Case was operating a theater on Sunday where moving pictures were shown. If it had been vaudeville, or a musical comedy, instead of exhibiting pictures, the result would have been the same. Showing moving pictures is not the gravamen of the offense, otherwise many of our leading ministers would

State v. Nashville Baseball Ass'n.

be violating the law when they illustrate their Sunday night sermons with moving pictures.

At the time of the passage of the act of 1803, operating theaters was one of the common vocations, and one that was looked upon by many as being immoral, and hence, operating a theater, regardless of the character of the entertainment, would fall within the statute.

We are therefore of the opinion that playing baseball on Sunday is not unlawful in Tennessee. It results that the writ of *certiorari* is granted. The decree of the court of civil appeals will be reversed, and the decree of the circuit court will be affirmed. The complainant will pay the costs.

Justice HALL, being incompetent, did not participate in the decision of this case.

State v. Barnes.

STATE v. BARNES.

(Jackson, April Term, 1919.)

1. PARENT AND CHILD. Failure to provide for child. Offenses.

Where a father failed to provide for his infant child under sixteen according to his means, but suffered the child to sicken and die without medical attention, he cannot be punished under Acts 1915, chapter 120, making it a misdemeanor for a father to willfully fail to provide for his child under sixteen, but providing that, upon complaint, the father shall be required to execute a bond to secure the child's support, etc., and in event of his failure to comply with the undertaking he may be imprisoned for misdemeanor, as a delinquent parent cannot be imprisoned as an original proposition under the statute, but only for repudiation or breach of the undertaking required by the statute. (*Post*, p. 471.)

Acts cited and construed: Acts 1915, ch. 120.

2. PARENT AND CHILD. Duty of parent.

It is the legal duty of a father to provide proper care, treatment, and medical attention for his infant child. (*Post pp. 471, 472.*)

Case cited and approved: Wallace v. Cox, 136 Tenn., 69.

3. HOMICIDE. Breach of duty.

If one owes to another a plain particular and personal duty imposed by law or contract, an omission resulting in the death of the party to whom such duty was owing usually renders the delinquent party guilty of homicide; so, where an infant child died by reason of her father's failure to provide proper medical attention, the father is guilty of homicide. (*Post, p. 472.*)

Cases cited and approved: Westrup v. Commonwealth, 123 Ky., 95; People v. Beardsley, 150 Mich., 206; Territory v. Manton, 8 Mont., 95; Anderson v. State, 27 Tex. App. 177; Gibson v. Commonwealth, 106 Ky., 360.

Case cited and distinguished: Regina v. Senior (1899), 1 Q. B., 283.

4. HOMICIDE. Failure to provide for child. Grade of offense.

As to whether a father, who suffered his child to die for want of proper medical attention, is guilty of murder or manslaughter,

State v. Barnes.

depends upon the circumstances; it being probable that, if the neglect was not malicious or willful, he would be guilty only of manslaughter. (*Post*, p. 473).

Cases cited and approved: *Rex v. Hughes*, 3 Jur. N. S., 996; *Lewis v. State*, 72 Ga., 164; *State v. Smith*, 65 Me., 257; *State v. Gilliam*, 66 S. C., 419.

FROM OBION.

Appeal from the Circuit Court of Obion County.—
HON. JOSEPH E. JONES, Judge.

The Attorney-General, for the State.

E. J. GREEN, for appellee.

MR. JUSTICE GREEN delivered the opinion of the Court.

From action of the trial court quashing an indictment in this case the State appeals. The indictment is as follows:

“S. K. Barnes, . . . on the——day of August, A. D. 1917, being the father of and legally chargeable with the care of Bessie May Barnes, an infant child under the age of sixteen years, in the county of Obion aforesaid, then and there unlawfully, willfully, and without good cause neglected and failed to provide for said Bessie Barnes, according to his means, by suffering said child to sicken and die without proper care, treatment, and medical attention.”

The motion to quash was based on three grounds: First, that the indictment charged no violation of any law or statute; second, that chapter 120 of the Acts of 1915, upon which the indictment was thought to have

State v. Barnes.

rested, did not apply to the facts stated; and, third, because it appeared from the indictment that the child was dead.

The state insists that the indictment can properly be sustained by chapter 120 of the Acts of 1915, even though the neglected child died before the indictment was found.

Chapter 120 of the Acts of 1915 makes it a misdemeanor for a father to willfully fail to provide for his child under sixteen years of age according to his means, or to leave it destitute or in danger of becoming a public charge. The penalty prescribed by this statute is that the father shall be required to execute a bond or undertaking to secure the child's support, and in case he fails to do so, or to comply with the conditions of said undertaking, then the father may be imprisoned as for a misdemeanor.

Manifestly the father cannot be required to enter into an obligation for the support of a child who has died. The delinquent father cannot be imprisoned as an original proposition under this statute. He can only be imprisoned for a repudiation or breach of the undertaking to support, imposed as the primary penalty of the statute. So we are of opinion that the father here cannot be reached under the act of 1915, the child being dead, and the trial judge correctly so held.

It does not follow, however, that this indictment should have been quashed. We think it does charge a violation of law.

It is the legal duty of the father to provide "proper care, treatment, and medical attention" for his child. *Wallace v. Cox*, 136 Tenn., 69 188 S. W., 611, L. R. A.;

State v. Barnes.

1917B, 690. If by reason of his breach of this duty the death of this child resulted, we think the father may be guilty of homicide.

If one owes to another a plain particular and personal duty, imposed either by law or by contract, an omission, resulting in the death of the party to whom such duty was owing, usually renders the delinquent party guilty of a homicide. This proposition is very well established by authority. *Westrup v. Commonwealth*, 123 Ky., 95 93 S. W., 646, 6 L. R. A. (N. S.), 685, 124 Am. St. Rep. 316; *People v. Beardsley*, 150 Mich., 206, 113 N. W., 1128, 13 L. R. A. (N. S.), 1020, 121 Am. St. Rep., 617, 13 Ann. Cas., 39; *Territory v. Manton*, 8 Mont., 95, 19 Pac., 387; *Anderson v. State*, 27 Tex. App., 177, 11 S. W., 33, 3 L. R. A., 644, 11 Am. St. Rep., 189.

This principle has been applied in cases of the neglect of the duty of a parent to care for his child, and to provide medical attention. *Gibson v. Commonwealth*, 106 Ky., 360, 50 S. W., 532, 90 Am. St., Rep. 230; *Regina v. Senior* [1899], 1 Q. B. 283.

In the latter case Lord Russell said: "Neglect is the want of reasonable care; that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind; that is, in such a case as at the present, provided the parent had such means as would enable him to take the necessary steps. . . . At the present day, when medical aid is within the reach of the humblest and poorest members of the community, it cannot reasonably be suggested that the omission to provide medical aid for a dying child does not amount to neglect." *Regina v. Senior*, supra.

State v. Barnes.

As to whether a parent so neglecting his child is guilty of murder or manslaughter would depend on the circumstances. If the neglect be willful or malicious, it is probably a case of murder. If the omission is not malicious, and is a mere case of negligence, the parent is perhaps guilty of manslaughter only. *Rex v. Hughes*, 3 Jur. N. S., 996; *Lewis v. State*, 72 Ga., 164, 53 Am. Rep., 835; *State v. Smith*, 65 Me., 257; *State v. Gilliam*, 66 S. C. 419, 45 S. E., 6.

The questions above discussed are elaborated in note under *Westrup v. Commonwealth*, supra, as that case is reported in 124 Am St. Rep., 316.

It results that the judgment of the trial court will be reversed, and this case remanded for further proceedings.

State ex rel. v. Shepherd's Estate.

STATE *ex rel.* THOMASON, Comptroller, *v.* SHEPHERD'S
ESTATE.

(Jackson, April Term, 1919.)

TAXATION. Collateral inheritance tax. Shares of brothers and sisters.
Statutes.

Although Acts 1893, chapter 174, section 1, providing for collateral inheritance tax, was not enforceable for a time against property passing to an intestate's brother or sister in view of the revenue law, Acts 1893, chapter 89, section 7, passed subsequently, which was held to repeal it by implication to the extent of its repugnance and the subsequent revenue acts, Acts 1895 (2d Sess.) chapter 4, Acts 1897, chapter 2, Acts 1899, chapter 432, section 1, Acts 1901, chapter 128, Acts 1903, chapter 257, Acts 1907, chapter 541, Acts 1909, chapter 479, Acts 1915, chapter 101, and Acts 1917, chapter 70, amending Acts 1915, chapter 101, and the language, "and acts amendatory thereof," in Acts 1901, chapter 128, which refers to live amendatory acts only, does not have the effect of reinstating Acts 1893, chapter 89, section 7, and shares of brothers and sisters are now subject to collateral inheritance tax.

Acts cited and construed: Acts 1893, ch. 89, sec. 7, ch. 174, sec. 1; Acts 1895, ch. 4; Acts 1897, ch. 2; Acts 1899, ch. 432, sec. 1; Acts 1901, ch. 128; Acts 1903, ch. 257; Acts 1907, ch. 541; Acts 1909, ch. 479; Acts 1915, ch. 101; Acts 1917, ch. 70.

Cases cited and approved: Bailey *v.* Drane, 96 Tenn., 16; Zickler *v.* Union Bank & Trust Co., 104 Tenn., 277; Tate et al. *v.* Greenlee, 141 Tenn.,—.

FROM SHELBY.

Appeal from the Circuit Court of Shelby County.—
Hon. J. P. YOUNG, Judge.

State ex rel. v. Shepherd's Estate.

T. B. CALDWELL and GILMER P. SMITH, for appellant.

BARTON & BARTON and W. H. BORSJE, for appellee.

MR. JUSTICE HALL delivered the opinion of the Court.

The question involved in this case is whether, during the year 1915, property passing by intestacy or devise to brothers and sisters in estates of the value of \$250 or more was subject to the payment of a collateral inheritance tax under the laws of this state.

Robert H. Shepherd died intestate on or about May 7, 1915, a citizen of Shelby county, Tenn., an unmarried man without issue. His only heir and distributee was Mary A. Sneed, his sister. The defendant, John S. Webb, was duly appointed and qualified as administrator of his estate. The estate consists of property valued at \$23,278. The present action was brought in the county court of Shelby county, Tenn., by the state upon the relation of John B. Thompson, its comptroller, seeking to collect a collateral inheritance tax alleged to be due under chapter 174, Acts 1893. The bill was filed on January 10, 1917.

At the July term of said county court, 1917, Mary A. Sneed, the sole heir and distributee of the said Robert H. Shepherd, deceased, was made a party defendant to said bill by leave of the court. Thereafter said defendants filed a demurrer to the bill, setting up the defense that the bill presented no ground for the collection of said tax, it appearing from its allegations that Mary A. Sneed, the sole heir and distributee of Robert H. Shepherd, deceased, was his sister; and, therefore, under the laws of this state, the property

State ex rel. v. Shepherd's Estate.

descending to her from her deceased brother is not liable for a collateral inheritance tax.

The county judge overruled this demurrer, and a decree was entered at the May term of the court, 1918, in favor of the complainant for a collateral inheritance tax of 5 per cent. of the clear value of said estate, and from this decree the defendants prayed, were granted, and perfected their appeal to the circuit court of the county.

Upon the hearing in the circuit court a decree was rendered, reversing the decree of the county court and sustaining the demurrer of the defendants, and the complainant's bill was dismissed with costs. From this decree an appeal was prayed, granted, and perfected to this court, and the action of the circuit judge in dismissing the bill is assigned for error.

By section 1, chapter 174, Acts 1893, it is provided that all estates—real, personal and mixed—of every kind whatsoever, situated within this state, whether the person or persons dying seized thereof be domiciled within or out of the state, passing from any person who may die seized or possessed of such estates either by will or under the intestate laws of this state, or any part of such estate or estates, or interest therein, transferred by deed, grant, bargain, gift, or sale, made in contemplation of death, or intended to take effect in possession or enjoyment after the death of the grantor or bargainor to any person or persons or to bodies corporate or politic, in trust or otherwise, other than to or for the use of the father, mother, husband, wife, children, and lineal descendants born in lawful wedlock of the person dying seized and possessed

State ex rel. v. Shepherd's Estate.

thereof, shall be, and are made subject to a duty or tax of \$5 on every \$100 of the clear value of such estate or estates so passing, and at the same rate for any less amount to be paid to the use of the State; and all owners of such estates and all executors and administrators and their sureties shall only be discharged from liability for the amount of such taxes or duties the settlement of which they may be charged with, by having paid the same over for the use of the State as thereafter directed; but no estate which may be valued at a less sum than \$250 shall be subject to said duty or tax. Said section further provides that the term "children" shall not be construed to apply to adopted children.

On the same day, but at a later hour in the day, the legislature passed a general revenue law for the State, imposing privilege taxes, being chapter 89 of the acts of that session; and in section 7 of that act a collateral inheritance tax was imposed, but this section expressly excepted from the tax imposed estates passing to brothers and sisters by devise or intestacy. Such estates were not, however, excepted by the provisions of chapter 174, Acts 1893, which is the general collateral inheritance tax law in force in this State.

This court held in the case of *Bailey v. Drane*, 96 Tenn., 16, 33 S. W., 573, that in this respect the two acts of the legislature of 1893 were inconsistent, and that the general revenue law having been passed at a later hour in the day than the general collateral inheritance tax statute, the exception in the general revenue act should prevail; and that therefore construing the two acts together, the collateral inheritance

State ex rel. v. Shepherd's Estate.

tax could not be imposed upon estates passing to brothers and sisters. In that case the court said:

"The two acts are repugnant and irreconcilably conflicting upon this particular point, and, being so, the latter one repeals the former, by implication, to the extent of that repugnance and conflict."

The next general revenue act passed by the legislature was in 1895. Acts 1895 (2d Sess.) chapter 4. In that act no mention was made of a collateral inheritance tax. The same is true of the general revenue act passed by the legislature in 1897. Acts 1897, chapter 2. The general revenue act passed in 1899 (Acts 1899, chapter 432), in section 1, declares "that there shall be levied and collected a collateral inheritance tax as provided for in chapter 174 of the Acts of 1893." Since that time general revenue acts have been passed by the legislature as follows: Chapter 128, Acts 1901; chapter 257, Acts 1903; chapter 541, Acts 1907; chapter 479, Acts 1909; chapter 101, Acts 1915; and chapter 70, Acts 1917, the latter amending chapter 101, Acts 1915. In all these acts it is provided "that there shall be levied and collected a collateral inheritance tax as provided for in chapter 174 of the Acts of 1893, and acts amendatory thereof."

In the case of *Zickler v. Union Bank & Trust Co.*, 104 Tenn., 277, 57 S. W., 341, this court held that the General Revenue Act of 1895, dealing generally with the subject of privilege taxation, took the place of the General Revenue Act of 1893, and repealed or suspended the latter act by implication, whereupon chapter 174, Acts 1893, subjecting to inheritance tax the estates of brothers and sisters descending by devise or the intestacy of the decedent, was again revived and

State ex rel. v. Shepherd's Estate.

General Revenue Act of 1893, and repealed or suspended the latter act by implication, whereupon chapter 174, Acts 1893, subjecting to inheritance tax the estates of brothers and sisters descending by devise or the intestacy of the decedent, was again revived and became operative, and that the shares of brothers and sisters so descending were liable for the inheritance tax provided for in said act.

It is insisted by complainant that all of the provisions of chapter 174, Acts 1893, are now in full force and effect, and that the shares of brothers and sisters are liable for the collateral inheritance tax imposed by said act; while it is contended by the defendants that the language, "and Acts amendatory thereof," appearing in chapter 128, Acts 1901, and the subsequent acts referred to, had the effect of reviving and reenacting section 7 of the General Revenue Act of 1893; or, stated differently by counsel for defendants in their brief, that said language amended chapter 174, Acts 1893, so as to except brothers and sisters from the provisions of said act, and that their shares in estates devised by or descending from a deceased brother or sister are no longer liable for such tax.

We are of the opinion that this contention is not well grounded. We do not think that the language, "and Acts amendatory thereof," appearing in the acts referred to, had the effect of amending chapter 174, Acts 1893, and we know of no theory upon which said language could have such an effect. Said language did not purport to amend chapter 174, Acts 1893. We think the language, "and Acts amendatory thereof," had reference to such live amendatory acts as might then be in existence, and cannot be construed as relat-

State ex rel. v. Shepherd's Estate.

ing to the General Revenue Act of 1893, which was repealed or suspended, by implication, by the General Revenue Act of 1895. Since the repeal or suspension of chapter 89, Acts 1893, no act has been passed by the Legislature amending chapter 174, Acts 1893, so as to except the shares of brothers and sisters from its provisions.

It is said in the brief of counsel for defendants that the question involved in the suit at bar was decided in accordance with the contention of defendants by this court in the case of *Tate et al. v. Greenlee*, reported in 141 Tenn., 103, 207 S. W. 716. This statement is erroneous. The question of whether the shares of brothers and sisters descending from a deceased brother or sister by inheritance or devise was not involved in that case. It is true that the provisions of chapter 89, Acts 1893, were referred to in the opinion in that case, but the court did not pass on the question of whether the shares of brothers and sisters were liable for the tax under chapter 174, Acts 1893, and it was not necessary for it to do so. The question there being whether shares, which it was alleged had been assigned to Tate and Greenlee by the nephews and niece of the decedent prior to his death, were liable for the collateral inheritance tax.

It results that we are of the opinion that the estate of Robert H. Shepherd, deceased, which descended to his sister, Mrs. Mary A. Sneed, under the laws of descent and distribution, is liable for the inheritance sued for; and a decree will be entered in this court reversing the decree of the circuit court and affirming the decree of the county court allowing a recovery of said tax, costs, and attorney's fees.

Ponder v. State.

PONDER v. STATE.

(Jackson, April Term, 1919.)

1. **ANIMALS.** Statutes. Classification of counties. Registering dogs. Priv. Laws 1917, chapter 648, section 1, declaring a public nuisance the running at large of dogs not registered, in counties having a population between 29,946 and 29,975, according to the 1910 federal census, is not unconstitutional as partial; counties being properly subjected to the population classification basis. (*Post*, pp. 487, 488.)

Acts cited and construed: Acts 1917, ch., 648.

Cases cited and approved: State v. Erwin, 139 Tenn., 341; Thomas v. State, 136 Tenn., 47.

2. **CONSTITUTIONAL LAW.** Discrimination. Registering dogs.

The requirement of Priv. Laws 1917, chapter 648, that dogs be registered and wear collars bearing tags for identification is reasonable, and the enactment that dogs not so identified are a public nuisance when found running at large, while dogs so identified are permitted to run at large, is not an arbitrary and unreasonable discrimination. (*Post*, pp. 488, 489.)

3. **STATUTES.** Title. Provisions germane to general subject. Registration of dogs. Disposition of fees.

Priv. Laws 1917, chapter 648, entitled "An act to regulate the keeping of dogs by requiring them to be registered and to declare the running at large of unregistered dogs a public nuisance in certain counties of this State and to provide penalties for violations of this act," is not unconstitutional as being broader than its title, in that section 8 thereof, providing that balance of registration fees, if any, shall be credited to a "Dog and Stock" fund, is not germane to its general subject; the tax being but an incident to the object expressed. (*Post*, pp. 489, 490.)

4. **EMINENT DOMAIN.** Licenses. Taxation. Taking property without just compensation. Equality of taxation.

Priv. Laws 1917, chapter 648, as to registering dogs, does not violate Constitution article 1, section 21, in that it takes property without

Ponder v. State.

just compensation being made therefor, nor article 2, section 28, providing that no one species of taxable property shall be taxed higher than any other species of property of the same value. (*Post*, pp. 490, 491.)

Constitution cited and construed: Art. 1, sec. 21; Art. 2, sec. 28.

5. ANIMALS. Dogs. Registration. Penalty.

Under Priv. Laws 1917, chapter 648, requiring registration of dogs, it is no defense to an indictment for keeping and permitting a dog to run at large in September without first having been registered, which is a misdemeanor under section 6, that the tax is not delinquent under section 12 until October 1st, since the latter section requires registration by July 1st. (*Post*, pp. 491, 492.)

FROM OBION.

Error to the Circuit Court of Obion County.—Hon. JOSEPH E. JONES, Judge.

PIERCE & FRY, for plaintiff in error.

THE ATTORNEY-GENERAL, for the State.

MR. JUSTICE HALL delivered the opinion of the Court.

The defendant below, Jim Ponder, was indicted in the circuit court of Obion county at its September term, 1917, for keeping a dog three months of age or over without having reported it for registration as required by chapter 648 of the Private Acts of 1917.

A motion was made to quash the indictment upon several grounds, all of which were overruled. Thereupon the defendant was tried without a jury, and a fine of \$10 was assessed against him, and he was taxed

Ponder v. State.

with the costs of the cause. His motions for a new trial and in arrest of judgment having been severally overruled and judgment entered against him, he has appealed to this court, and has assigned errors.

It is conceded that the evidence was sufficient to support the judgment of the trial court, and the questions raised upon this appeal are all based upon the alleged unconstitutionality of chapter 648 of the Private Acts of 1917, under which the defendant was indicted, and upon the alleged insufficiency of the indictment. These questions were presented by the motion to quash the indictment.

Chapter 648 of the Private Acts of 1917 applies to counties having a population of not less than 29,946 nor more than 29,975, according to the federal census of the year 1910, or any subsequent federal census. Obion county was given a population of 29,946 by the federal census of 1910, and therefore falls within the application of said act. The title of said act is as follows:

“An act to be entitled ‘An act to regulate the keeping of dogs by requiring them to be registered and to declare the running at large of unregistered dogs a public nuisance in certain counties of this State, and to provide penalties for violation of this act.’ ”

Section 1 of the act provides that the running at large of dogs not registered as otherwise provided in the act is declared to be a public nuisance, and requires that the owners of dogs three months of age or over shall report the same for registration annually to the circuit court clerk.

Ponder v. State.

Sections 2 and 3 of the act direct the circuit court clerk with respect of the registration.

Section 4 provides for the method of registration, and provides that every person registering a dog shall be furnished with a leather collar, to which must be attached a tag showing the registered number of the dog, which collar and tag must be kept on the dog continuously.

Section 5 provides that for the registry of each dog and the furnishing of the collar and tag a fee of \$1.50 must be collected by the circuit court clerk.

Section 6, the penal section, upon which the indictment is based, is as follows:

"Any person owning or keeping a dog three months old or over, and failing to report the same, for registration, or permitting such to run at large without being registered, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than five dollars nor more than twenty-five dollars for each dog kept and not reported, or permitted to run at large without being registered, and shall pay all costs."

Section 7 gives the grand jury inquisitorial powers over violations of said act.

Section 8 provides for the keeping of an account of the registry fees collected, and for the payment of the administration of the act, and then provides that: "The balance, if any remaining shall be credited to an account to be opened and kept by the clerk to be known as the 'dog and stock' fund and shall be paid out as the law in such cases may provide, and all such disbursements be reported to said court and sworn to by the clerk."

Ponder v. State.

Other provisions of this section are immaterial.

Section 9 provides for the annual registration of each dog.

Section 10 provides that county tax assessor shall annually make a list of all dogs found in the county, for which he is to receive a fee of five cents for each dog listed and reported to the clerk.

Section 11 provides that a certified copy of the list of all delinquent owners of dogs who have failed to register their dogs shall be furnished to the grand jury at any term of court, and further provides that the certified list shall constitute *prima-facie* evidence of the nonregistration of dogs, upon which the grand jury is authorized to return an indictment, as provided by sections 6 and 7.

Section 12 provides that the registration must be made or renewed during the month of July of each year, and further provides that the registration "shall become delinquent from and after the 1st day of October of each year."

Section 13 provides that nothing in the act shall exempt the owner of any dog from liability for any damage caused by it.

Section 14 provides that the statute shall apply to counties having a population of not less than 29,946 nor more than 29,975, according to the federal census of the year 1910 or any subsequent federal census.

This court, in the case of *State v. Erwin*, 139 Tenn., 341, 200 S. W., 973, passed upon the constitutionality of a statute similar to the one now involved. The title of the act involved in that case was almost identical with the title of the act involved in the instant case, the

Ponder v. State.

only exception being that the act in the Erwin Case affected only female dogs. The title of the act in the Erwin Case was as follows:

"An act to regulate the keeping of female dogs, by requiring them to be registered, and to declare the running at large of unregistered female dogs a public nuisance." Laws 1907, chapter 32.

The material points of difference between the statute involved in the Erwin Case and the statute involved in the instant case are as follows:

(1) The statute involved in the Erwin Case applied to the State at large, while the statute involved in the case at bar applies only to certain counties; (2) the statute involved in the Erwin Case applied only to female dogs, while the statute involved in the case at bar applies alike to all dogs; (3) the registration fee provided for in the statute involved in the Erwin Case was \$3, while the registration fee prescribed by the statute under consideration is only \$1.50; (4) the registration provided for in the statute involved in the Erwin Case was not to be renewed, while the statute under consideration provides for an annual registration; (5) the balance remaining from the proceeds of the registration required by the statute involved in the Erwin Case, after paying all expenses incident to the administration of the statute, was required to be paid into the common school fund, while the balance of such fund, under the statute involved here, is required to be paid into a "dog and stock" fund, the disposition of which is provided for in another statute (chapter 647 of the Private Acts of 1917, applying to the same counties).

Ponder v. State.

In the Erwin Case this court held that while dogs are property, as repeatedly held in the earlier cases cited by the court in that case, they are property of such a character that the legislature, in the exercise of the police power of the State, has seen fit to regulate the keeping of them so as to protect the safety of the people and property from their offensive and destructive propensities; that while the registration of dogs, and attaching collars to them with tags, for which the owner is made to pay a tax, will not change their inherently bad qualities, the registration and payment of the tax "will probably reduce their number and cause the owners of them to use greater care to see that they do not harm the persons or property of others."

It was further held in the Erwin Case that the requirement of the payment of the registration fee was not arbitrary class legislation. It was further held that the object of the statute was the regulation of dogs, and that the tax was only an incident to the object expressed, and was not put into the statute primarily for the purpose of raising revenue.

We think the same general rules of construction and principles enunciated in the Erwin Case apply, in the main, to the questions presented by the assignments of error in the case under consideration.

The defendant insists that section 1 of the statute under consideration, declaring that the running at large of dogs not registered is a public nuisance, in certain counties of the State, is an arbitrary discrimination against the citizens of the counties affected, and is therefore unconstitutional and void.

Ponder v. State.

This very question was settled against the contention of the defendant in the cases of *Thomas v. State*, 136 Tenn., 47, 188 S. W., 617; and *Sullivan v. State*, 136 Tenn., 194, 188 S. W., 1153. In those cases, and in the earlier cases cited by the court in them, statutes were involved making it unlawful for owners of live stock in certain counties to permit their stock to run at large, the provisions of said statutes being intended for the protection of other citizens who might have growing crops subject to damage by live stock. It was expressly ruled in those cases that such statutes were not partial class legislation in violation of the Constitution, since the counties were properly subjected to the population and classification basis.

It is next insisted by the defendant that the registering of the dog does not make it any less a public nuisance, and that it is an unreasonable and arbitrary enactment to provide that a dog not registered is a public nuisance; that the absence of the collar, which is provided for a registered dog, being no ground for declaring such a dog a nuisance.

The court, in the *Erwin Case*, supra, used this language: "Of course, the registration of dogs and attaching to them collars with tags, for which the owner is made to pay a tax, will not change their inherently bad qualities; but it will probably reduce their number and cause the owners of them to use greater care to see that they do not harm the persons or property of others."

We think the registering of the dog and requiring him to wear a collar, which bears a tag containing a number by which the name of the owner can be as-

Ponder v. State.

certained on reference to the books in the office of the circuit court clerk, is a reasonable distinguishing mark, and the enactment that dogs not so identified are a public nuisance, when found running at large, while the dog so identified is permitted to run at large, is not an arbitrary and unreasonable discrimination. The State, in the exercise of its police power through the legislature, has full power to provide that a dog may not be allowed to run at large unless he bears such mark of identification. Such requirement will enable the owner of sheep or other property damaged by such dog, if the dog should be killed or captured, to discover the owner of the dog, who may be held liable for damages for the injury done by him. Also, as held in the Erwin Case, the requirement of a small registration fee will tend to reduce the number of worthless dogs.

The holding of the court in the Erwin Case is a sufficient answer to defendant's further contention that it is unreasonable to require all dogs to be registered, including those which are too small and weak to kill a sheep. While the principal object of the act it may be conceded is to protect sheep and hogs, the act is not limited to that purpose.

It is next insisted that the act in question is broader than its title, because of the provision of section 8, which provides that the balance of the proceeds of the registration fees, "if any remaining, shall be credited to an account to be opened and kept by the clerk to be known as the 'dog and stock' fund, and shall be paid out as the law in such cases may provide." It is insisted that this provision of the act is not germane to the general subject of the act which is expressed in

Ponder v. State.

the title "to regulate the keeping of dogs by requiring them to be registered," etc.

In the Erwin Case the title of the act went no further than the title of the act in the present case. In that act it was provided that the balance of the proceeds of registration fees, if any balance should remain after paying all the expenses incident to the administration of the act, should go to the "common school fund." This court held that the tax was only an incident to the object expressed, and was not much more than enough to cover the cost of its execution. The tax provided by the statute involved in that case was twice as great as the tax provided by the statute under consideration. We are therefore of the opinion that the provision for the disposition of whatever balance of the fund that might remain, after the payment of the expenses provided for in same, is germane to the general subject of the act, which is the requirement of registration. It certainly is not such a distinct and severable subject, the introduction of which would render the act invalid.

It is next insisted that the court erred in overruling the motion to quash the indictment, because said act violates article 1, section 21, of the Constitution of the State, in that it takes property without just compensation being made therefor; and that it also violates article 2, section 28, of said Constitution, which provides that no one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value.

These questions were ruled adversely to defendant's contention in the case of *State v. Erwin*, supra, the

Ponder v. State.

court holding that the statute involved in that case, which, in principle, is the same as the statute involved in the case under consideration, did not have for its primary object the raising of revenue, but was a police regulation, its object being to regulate dogs; that the tax was only an incident to the object expressed, and was not much more than enough to cover the cost of its execution.

The next and last insistence of the defendant is that the trial judge erred in overruling the twelfth ground of defendant's motion to quash the indictment, which was as follows:

"Because the said statute shows upon its face that the parties failing to pay the dog tax are not delinquent until the 1st day of October, 1917. Hence no indictment can be predicated upon said statute until said time."

The twelfth section of the act provides as follows:

"All dogs shall be registered or registration renewed in the month of July of each year from and after the date of the passage of this act, and shall become delinquent from and after the 1st day of October of each year."

It is a sufficient answer to this last contention of the defendant to say that he was not indicted, and is not being prosecuted for his failure to pay a registration fee; but he is charged with owning and keeping and permitting to run at large a dog, which should have been registered, but which was not registered. It is provided in section 12 of the act that all such dogs must be registered during the month of July. The indictment returned against the defendant charged him with

Ponder v. State.

keeping and permitting a dog to run at large in September, 1917, without first having been registered, which is a misdemeanor under section 6 of said act.

It results that we find no error in the judgment of the court below, and it is affirmed, with costs:

Sumner County v. Interurban Transp. Co.

SUMNER COUNTY v. INTERURBAN TRANSP. CO.

(*Nashville*. December Term, 1918.)

1. TURNPIKES AND TOLL ROADS. Ownership of road by turnpike company. Conveyance to county.

Since a turnpike company never owned certain public roads, merely having had the right to erect gates over them and collect tolls for travel on them by complying with certain conditions prescribed by law, its conveyance to the county added nothing to the rights of the county and merely destroyed the rights of the company. (*Post*, pp. 497, 498.)

Cases cited and approved: *State v. Stroud* (Ch. App.), 52 S. W., 697; *Laufer v. Bridgeport Traction Co.*, 68 Conn., 457; *Morse v. Sweenie*; 15 Ill. App. 486; *Bogue v. Bennett*, 156 Ind., 478; *Wild v. Deig*, 43 Ind., 455; *Burlington, etc., v. Johnson*, 38 Kan., 142; *Riley v. Buchanan*, 116 Ky., 625; *Macomber v. Nichols*, 34 Mich., 212.

2. HIGHWAYS. "Public road."

A "public road" is a way open to all the people, without distinction, for passage and repassage at their pleasure. (*Post*, pp. 497, 498.)

3. HIGHWAYS. Exclusion from use. Authority of court.

The county court has no power, without legislative authority, to exclude any member of the public from reasonable use of a public road. (*Post*, pp. 498, 499.)

4. HIGHWAYS. Power to control. Prescription. Conditions of use.

The Legislature, as the constitutional representative of the public, has the power to levy reasonable conditions on members of the public for their use of the public roads; but the county court, without express authority, has not such power, cannot take such action as proprietor, and as a county court has no power to legislate, so that an attempt of the court to restrict the size of motor trucks of a company and the weight of their

Sumner County v. Interurban Transp. Co.

loads was void, being unauthorized by the legislature. (*Post*, pp. 498, 499.)

Cases cited and approved: Ledbetter v. Turnpike Co., 110 Tenn., 92; Turnpike Co. v. Marshall, 61 Tenn., 118; Johnson v. Brice, 112 Tenn., 65.

5. HIGHWAYS. Right to use.

Every member of the public has the right to use the public roads in a reasonable manner for the promotion of his health and happiness; the use being restricted to a use with due care and in a reasonable manner. (*Post*, p. 500.)

6. HIGHWAYS. Use by motor vehicles.

The motor vehicle being a common means of transportation, and its use on the public roads being authorized wherever the size and character of the vehicle is not restricted by the legislature, the fact that a transportation company has used motor trucks heavier than customary, to the damage of the public roads and bridges of the county, does not give the county court or any one else an action against it for such use. The county can neither restrain the use of the roads or bridges, nor collect damages on account of their reasonable use. (*Post*, p. 500.)

7. HIGHWAYS. Excessive use. Liability.

Transportation company, operating heavy motor trucks on public roads and bridges of a county, held not liable to the county or county court as for an excessive use of the roads, though the trucks were so heavy as to break down the roads to some extent, and constituted a greater load than the bridges were designed to bear. (*Post*, p. 500.)

8. HIGHWAYS. Reasonable use. Motor trucks.

Unreasonable use of public roads of a county by a transportation company using motor trucks must have involved more than the mere weight of the trucks and their loads, and have related to the manner of use, either in the management of the vehicles, so as to carelessly operate them upon the roads, or reckless driving by the motorman. (*Post*, pp. 500, 501.)

Sumner County v. Interurban Transp. Co.

FROM SUMNER.

**Appeal from the Chancery Court of Sumner County.
—Hon. J. W. STOUT, Chancellor.**

W. L. GRANBERRY, W. L. GRANBERRY, JR., and H. E. PALMER, JR., for appellant.

A. O. DENNING, G. W. BODDIE, J. T. DURHAM and BASKERVILLE & McGLOTHLIN, for appellee.

MR. CHIEF JUSTICE LANSDEN delivered the opinion of the Court.

Complainant filed this bill in the chancery court against the Interurban Transportation Company, a corporation, to enjoin it from using trucks upon the roads of the complainant. The bill shows in brief that the defendant is engaged in the transportation of freight over certain roads in Sumner county, which were formerly turnpike roads, built by corporations organized for such purposes. The county bought the turnpikes, and it and the state levied certain taxes upon defendant, which were all paid. Defendant owned a number of heavy trucks and operated them between the city of Nashville and points in Sumner and Trousdale counties, and over the roads which the county had purchased from the turnpike companies. The trucks and loads hauled over the roads and bridges in Sumner county weighed something more than ten tons, and are heavier than the roads and bridges, built by the turnpike

Sumner County v. Interurban Transp. Co.

companies, were intended to accommodate. The use of the trucks upon the roads was very destructive to them. The roads were built of macadam, and the bridges were intended to accommodate a load of about three thousand pounds. However, it is not shown that any bridge or highway was destroyed by the use to which it was subjected, but it is shown that the roads were damaged very materially by running the trucks over them. It is shown that the use of these heavy trucks upon macadam roads is destructive of them within a very short time.

An injunction was granted upon the following condition:

"But said injunction to stand dissolved when the defendant files with you [the C. & M.] a bond in the penalty of one thousand dollars, conditioned to pay the complainant such damages as it may sustain and the court award for any excessive or unreasonable use of the highways and bridges of Sumner county, under the charges and allegations of the original bill."

The Hartford Accident & Indemnity Company became surety upon the bond.

The chancellor held the defendant liable for all damages to the roads and bridges occasioned by the use of the heavy, loaded trucks upon them. There is no showing that the use of the roads and bridges was in an unreasonable way other than might be attributed to the use of heavy trucks. Judgment was rendered for more than \$5,000 against the transportation company and for \$1,000 against the surety. The surety appealed to the court of civil appeals, and as there was no showing in the evidence for "any excessive or un-

Sumner County v. Interurban Transp. Co.

reasonable use of the highways and bridges" by defendants, the court of civil appeals reversed and remanded the case to the chancery court of Sumner county for it to ascertain, if any, what damage was occasioned to the roads by excessive and unreasonable use of them and the bridges.

The surety has filed this petition for *certiorari*, and contends that the decree of the court of civil appeals, although undertaking to save the questions made upon the merits of the controversy, nevertheless in effect adjudges the transportation company liable for excessive and unreasonable use of the highways and bridges, and its decree is therefore *res adjudicata*. We think this view is correct, and that it is necessary for us to decide the merits of the controversy. It is erroneous to suppose that the surety is not interested in the merits. If his principal had the right to run the motor trucks over the roads of the complainant, and if the management of the trucks being used was reasonable and with due care, the surety would have no liability whatever.

The county claims as vendee of the turnpike company. This does not strengthen the claim of the county, for it is manifest that the turnpike company did not own the roads, nor have power to convey them. It had the right to erect gates over them, and collect tolls for travel on them, by complying with certain conditions prescribed by law. But it never owned the roads, and therefore its conveyance to the county added nothing to the rights of the county, and merely destroyed the rights of the turnpike company. The roads belong

Sumner County v. Interurban Transp. Co.

to the public, and the county court holds them in trust for the public, and while it is proprietor for the purposes of its trust, it is not proprietor in the sense that it is the owner of the roads against the public, or any member thereof. A public road is a way open to all the people, without distinction, for passage and repassage at their pleasure. Definitions in other terms have been given, but they mean substantially the same as the one just stated. The authorities make it clear that any road which is not for the use of the people is not a public road; the fact that it is for the benefit of the public destroys the thought that there can be a private ownership of the road. *State v. Stroud* (Ch. App.), 52 S. W. 697. This is a case of the court of chancery appeals and was affirmed by this court. *Laufer v. Bridgeport Traction Co.*, 68 Conn. 457, 37 Atl., 379, 37 L. R. A., 533; *Morse v. Sweenie*, 15 Ill. App., 486; *Bogue v. Bennett*, 156 Ind., 478, 60 N. E., 143, 83 Am. St. Rep., 212; *Wild v. Deig*, 43 Ind., 455, 13 Am. Rep., 399; *Burlington, etc., v. Johnson*, 38 Kan., 142, 16 Pac., 125; *Riley v. Buchanan*, 116 Ky., 625, 76 S. W., 527, 63 L. R. A., 642, 3 Ann. Cas., 788; *Macomber v. Nichols*, 34 Mich., 212, 22 Am. Rep., 522. And the same definitions will be found in the reports of Missouri, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Texas, Vermont, Virginia, Wisconsin, and perhaps other states. We also cite *Bouvier's L. Dict.*, *Burrill, L. Dict.*, *Century Dict.*, *Holt-house, L. Dict.*, *Jacob, L. Dict.*, *Tomlin, L. Dict.*, *Rapalje & L. L. Dict.*, and *Webster, Dict.*

This being the established nature of a public road, the county court would have no power to exclude any

Sumner County v. Interurban Transp. Co.

member of the public from its reasonable use without legislative authority. So far as we are advised, the legislature not only has not forbidden the use of motor vehicles, without regard to weight or load, upon public highways, but has authorized their use by levying a tax upon them. As stated heretofore, the defendant has paid this tax. The legislature, as the constitutional representative of the public, has the power to levy any reasonable condition upon members of the public for their use of the public roads; but the county court, without express authority, has not such power. It cannot take such action as proprietor, and as a county court it has no power to legislate. The manner of its discharge of its trust comes from the legislature. *Ledbetter v. Turnpike Co.*, 110 Tenn., 92, 73 S. W., 117; *Turnpike Co. v. Marshall*, 2 Bax., 118; *Johnson v. Brice*, 112 Tenn., 65, 83 S. W., 791.

It follows, therefore, that the attempt of the county court to restrict the size of vehicles and the weight of their loads is void, because the legislature has not authorized such action.

Public roads, like everything else, are developing in their nature and character, and in the uses to which the public subjects them. As civilization develops, and the inventive genius of man progresses, new uses of public roads may be found. The remedy, in such event, is not to restrict the public in its enjoyment of the public highways, but to improve and enlarge the highways. Their sole use is to accommodate the public, and enable its members to communicate with each other, both socially and in a business way.

Sumner County v. Interurban Transp. Co.

It is well-settled law that every member of the public has the right to use the public roads in a reasonable manner for the promotion of his health and happiness. Such use, however, is restricted to a use with due care and in a reasonable manner. In so far as the bill seeks to prevent defendant from using the public roads, because its trucks and their loads are too heavy, it must be dismissed. The motor vehicle is now a common means of transportation, and its use upon the public roads is authorized, wherever the size and character of the vehicle is not restricted by the legislature, and will be controlled, so far as we know, only by the convenience and profit of the public. The fact that the transportation company has used vehicles heavier than customary does not give the court, or any one else, an action against it for such use. The county can neither restrain it from using the public roads and bridges, because of the size of its vehicles, nor collect damages for their reasonable use. If the defendant has operated its vehicles negligently, it would be liable in damages to any one who has been injured thereby.

We do not think the defendant is liable for the excessive use of the roads. There is no legislative enactment prescribing an excessive use, and until there is one we cannot say that the uses to which the roads were subjected by defendant are excessive.

The unreasonable use of the roads by the defendant might be ascertainable. It must have been more than the weight of the vehicles and their loads, and must relate to the manner of the use, either in the management of the vehicles, so as to carelessly operate them upon the roads, or the reckless driving of the vehicle

Sumner County v. Interurban Transp. Co.

by the motorman. The county in such cases might enjoin the employment of a negligent and reckless motorman, but we cannot conceive that it could enjoin the use of the vehicle if reasonably made. Within the meaning of this opinion we will remand the case for the ascertainment of such damages to the roads and bridges as may have accrued from the unreasonable use of the motor vehicles.

Reversed and remanded. . .

RESPONSE TO PETITION TO REHEAR.

The petition to rehear is allowed, and the decree heretofore entered will be modified, so as to dismiss the case as to the defendant Hartford & Indemnity Company.

The statements made in the petition make a case for the modification above referred to, and as the petition is not answered its allegations are taken as true both in law and in fact.

Hickerson v. State.

W. J. HICKERSON v. THE STATE.

(Nashville. December Term, 1918.)

1. CRIMINAL LAW. Bill of exceptions. Time for filing.

Where bill of exceptions in a criminal case was not signed and filed within sixty days after trial term, but at a subsequent term in which a new trial motion was heard, that part of bill relating to new trial motion was seasonably preserved, but portion relating to proceedings at trial will be stricken. (*Post*, pp. 503, 504.)

Case cited and approved: Dunn v. State, 127 Tenn., 267.

2. CRIMINAL LAW. Review. Separation of jury. Burden of proof.

A jury separation in a felony case, with possibility that a juror has been tampered with, renders verdict *prima-facie* void, and State has burden of making a satisfactory explanation. (*Post*, pp. 504, 505.)

3. CRIMINAL LAW. Separation of jury. Prejudicial effect.

Where a juror in a homicide case was permitted to return home on account of illness and death of his child, the explanation of an officer who attended him that he did not think juror talked to any one except his wife, that he did not think anything improper occurred, etc., held insufficient to show that no prejudice resulted to accused. (*Post*, pp. 504, 505.)

Case cited and approved: Sherman v. State, 125 Tenn., 19.

4. CRIMINAL LAW. Separation of jury. Waiver by failure to object.

In a homicide case accused did not waive his right to object to separation of the jury by failing to bring matter to court's attention during trial. (*Post*, pp. 505, 506.)

Cases cited and approved: Thomas v. State, 109 Tenn., 688; Preston v. State, 115 Tenn., 343; Hobbs v. State, 121 Tenn., 413; Long v. State, 132 Tenn., 649.

5. CRIMINAL LAW. Appeal. Reversible error.

Acts 1911, chapter 32, prohibiting reversal unless error affecting

Hickerson v. State.

result affirmatively appears, does not preclude reversal in a homicide case for separation of the jury, where proceedings at trial are not before the court, since statute applies only to cases where supreme court can consider merits of controversy. (*Post*, p. 506.)

Acts cited and construed: Acts 1911, ch. 32.

FROM WAYNE.

Error to the Circuit Court of Wayne County.—Hon. W. B. TURNER, Judge.

JOHN A. GREER and SIMS & TURMAN, for plaintiff in error.

WM. H. SWIGGART JR., Assistant Attorney-General, for the State.

MR. JUSTICE GREEN delivered the opinion of the Court.

The plaintiff in error was indicted for murder, convicted of involuntary manslaughter, and has appealed in error to this court.

A preliminary motion is made by the State to strike the bill of exceptions from the transcript. This motion must be granted as to that portion of the bill of exceptions containing the evidence heard upon the trial of the case. The bill of exceptions was not signed and filed at the trial term, nor within sixty days thereafter. And consequently so much of the bill of exceptions as contained proceedings at the trial term must go out. *Dunn v. State*, 127 Tenn., 267, 154 S. W., 969.

A motion for a new trial was made, but the hearing of this motion was continued until a subsequent term, the bill of exceptions taken at that subsequent term

Hickerson v. State.

containing the proceedings herein at both terms. That part of the bill of exceptions relating to proceedings on the hearing of the motion for a new trial was, however, seasonably preserved, and to this we may look. *Dunn v. State*, supra.

On motion for a new trial it was made to appear that during the hearing of the case one of the jurors received tidings that his child was quite sick. The trial was suspended, and the juror excused temporarily by the court and sent to his home in charge of an officer. The child died. The juror remained at his home a portion of two days and one night. The officer was at the juror's home likewise, but the latter was permitted to spend a portion of the night in the room with his wife, the two being alone, and the next day the juror and his wife rode together to the child's funeral, and at the funeral another woman was seen to talk to the juror out of the officer's hearing, and it appears that on the way to the graveyard, and at that place, the juror was permitted to move around at some distance from the officer so that others might talk with him out of the officer's hearing.

Concerning these things the officer testified that he had received instructions from the court as to the custody of the juror, and the officer said he did not think anything improper occurred, and that he did not think anybody except the juror's wife talked with the latter. It is well settled in Tennessee that the separation of the jury in a felony case, and the possibility that a juror has been tampered with and received other impressions than those derived from the testimony in court, renders the verdict *prima facie* vicious. The

Hickerson v. State.

separation may be explained and it may be shown by the State that the separated juror had no communication with others, and that, if said communications were had, they did not relate to the case on trial. The burden is upon the State, however, to make a satisfactory explanation. *Sherman v. State*, 125 Tenn., 19, 140 S. W., 209, and cases therein reviewed.

It is obvious that the officer in charge of the separated juror in this case made no satisfactory explanation of the matters heretofore mentioned. The officer was not positive about any of his statements, and the statements made were insufficient.

It is insisted for the State that this error is not available to the plaintiff in error here, because it does not appear from the affidavit filed in support of the motion for a new trial that plaintiff in error was ignorant of the juror's conduct during the further progress of the trial below. It is insisted that the defendant below, if not ignorant thereof, should have called the attention of the court to the actions of this juror immediately upon the juror's return from the funeral, and at that time procured the entry of a mistrial and saved further proceedings. For this proposition the State refers to *Thomas v. State*, 109 Tenn., 688, 75 S. W., 1025. This case, and *Preston v. State*, 115 Tenn., 343, 90 S. W., 856, 5 Ann. Cas., 722, *Hobbs v. State*, 121 Tenn., 413, 118 S. W., 262, 17 Ann. Cas., 177, and others that might be mentioned, hold that it is generally the duty of a defendant to promptly call the court's attention to any impropriety occurring during the progress of a trial, and that a defendant will not be allowed to remain silent and experiment with the court and

Hickerson v. State.

bring up such a matter for the first time after the trial is ended adversely to such defendant.

All of these cases proceed on the idea of waiver. It has been held, however, in *Long v. State*, 132 Tenn., 649, 179 S. W., 315, that a defendant may not, in a felony case, agree to the separation of the jury.

Nor do we think chapter 32 of the Acts of 1911 can be applied here. The act of 1911 is to be invoked only where this court can look to the merits of the controversy. Where the whole case is before us and we can see that the merits have been reached, there will be no reversal for errors not affecting the merits.

Upon this hearing, however, we are prevented by the motion of the State, first above referred to and granted, from considering the merits of this case. The bill of exceptions containing the evidence heard upon the trial goes out. The State submits this case on technical grounds. It is always permissible to meet a technicality with a technicality, and under the holding in *Long v. State*, supra, the separation of the jury cannot be referred to as a technical error.

It results that the motion of the State to strike is sustained as to that portion of the bill of exceptions relating to the proceedings at the trial of this case, and the costs of incorporating such matters in the transcript will be taxed to plaintiff in error. For the reasons above indicated, however, the case must be reversed and remanded for a new trial.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
WESTERN DIVISION.

JACKSON. APRIL TERM, 1919.

JAMES F. HUNTER *et al.* v. MATT STEWART Co., *et al.*

(*Jackson*. April Term, 1919.)

1. BILLS AND NOTES. Payment or purchase of note.

Where a company unable to pay its notes upon which stockholders were indorsers executed to a bank a note payable in four months for the exact amount advanced by the bank to take up said two prior overdue notes, which were not to be canceled or stamped paid but attached as collateral for the money advanced, *held*, the bank became a purchaser and owner of the overdue notes, and that there was no payment thereof. (*Post*, pp. 515, 516.)

Cases cited and approved: *Cussen v. Brandt*, 97 Va., 1; *Dodge v. Freedman Savings & Trust Co.*, 93 U. S., 379; *Carter v. Burr*, 113 U. S., 737; *Swipe v. Leffingwell*, 72 Mo., 348; *McDonnell v. Burns*, 28 C. C. A., 174; *Brice's Appeal*, 95 Pa., 150; *Meredith v. Dibrell*, 127 Tenn., 387.

Cases cited and distinguished: *Wood v. Guarantee, etc., Co.*, 128 U. S., 416; *Johnston v. Schnabaum*, 86 Ark., 82; *Hirsch v. People's Bank of Plaquemine*, La., 240 Fed., 664.

Hunter v. Matt Stewart Co.

2. BILLS AND NOTES. Indorsers. Discharge. Extension of time.

Where a company unable to pay its notes upon which stockholders were indorsers executed to a bank a note payable in four months for the exact amount advanced by the bank to take up said two prior overdue notes, and the overdue notes were not to be canceled or stamped paid, but attached as collateral for the money advanced, held, that the rights of the bank against the indorsers were reserved within the Negotiable Instruments Act. (*Post*, pp. 516-521.)

Cases cited and approved: *Place v. McIlvain*, 38 N. Y., 96; *National Bank of Newburgh v. Bigler*, 83 N. Y., 51.

Cases cited and distinguished: *Morgan v. Smith*, 70 N. Y., 537; *National Park Bank of New York v. Koehler*, 137 App. Div., 785.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.—HON. F. H. HEISKELL, Chancellor.

WRIGHT, MILES, WARING & WALKER and W. H. BORSJE, for plaintiffs.

THOS. M. SCRUGGS, for defendant,

MR. JUSTICE MCKINNEY delivered the opinion of the Court.

The Matt Stewart Company was incorporated for the purpose of manufacturing and marketing certain machines patented by Mr. Matt Stewart. The venture was a failure.

On September 11, 1911, the said Matt Stewart Company executed a note for \$1,600, payable to its own order, and indorsed by W. M. Goodbar, J. M. Hays, J. R. Collins, J. C. Canale, and E. Q. Withers.

Hunter v. Matt Stewart Co.

On October 6, 1911, it executed another note for the same amount, and indorsed by W. M. Goodbar, J. M. Hays, and J. R. Collins. Both notes matured four months from date. In due course and before their maturity, these two notes became the property of the Security Bank & Trust Company of Memphis. The complainants claim to be the present owners of these notes and instituted this suit against the maker, Matt Stewart Company, and certain of the indorsers to recover the face value of same, together with interest and attorneys' fees.

The chancellor rendered a decree against defendants for the full amount sued for. Two of the indorsers, J. R. Collins and J. C. Canale, have appealed to this court and have assigned errors.

These notes were executed for the purpose of enabling the Matt Stewart Company to borrow money to be used in the conduct of its business, and these complaining indorsers were stockholders in the company.

In the summer of 1912, the holder of these two notes, Security Bank & Trust Company, turned them over to its attorney, Judge Scruggs, for collection. The Matt Stewart Company had no funds and was unable to take up said notes, and it did not want the indorsers on said notes to have to pay same. The active officers of the company, Mr. Stewart and Mr. Hays, appealed to Mr. Hunter Raine, president of the Mercantile Bank, for financial aid in taking care of this indebtedness. The prospect of the company was fully discussed, and Mr. Raine became interested and thought its outlook was bright. He was fully advised as to these two \$1,600 notes, being informed that in one of

Hunter v. Matt Stewart Co.

them protest was waived and that the other had been legally protested. He testifies that he knew that Collins, Goodbar, and Canale made the notes absolutely good; that he knew that Hays was without means, but that he was an honorable man in whom he had confidence; that he had just met Mr. Stewart, and was advised that he had no property. He thereupon decided to aid this company in its embarrassed condition, and acting for the bank he turned over to Hays and Stewart \$3,537.20, being the amount necessary to take up these two notes, with instructions not to have the notes canceled or stamped paid, and to bring the notes to the bank to be held as security or collateral for the money so advanced; and these instructions were fully carried out, with the exception that Stewart and Hays, instead of taking the money to Judge Scruggs, deposited the money to the credit of Matt Stewart Company, and gave Judge Scruggs a check against said deposit for said two notes. This was on August 10, 1912.

On August 12, 1912, the Matt Stewart Company executed to the Mercantile Bank its note for \$3,537.20, the exact amount advanced by said bank to take up the said two \$1,600 notes. This note was payable four months from date, and was indorsed by Stewart and Hays, and the two \$1,600 notes were attached as collateral thereto. This note was renewed several times, and the two \$1,600 notes were always attached to the renewal notes. The \$3,537.20 note, as well as the renewal notes, contained the following provision:

"The undersigned also hereby agrees to give said bank, or its assigns, such additional collaterals as its president or cashier may at any time demand, and if

Hunter v. Matt Stewart Co.

said additional collaterals shall not be promptly given when demanded, this note shall become immediately due and payable."

Mr. Raine, when asked as to why he took the \$3,537.20 note, said:

"The reason I had the Matt Stewart Company to make a new note was this: Banks don't buy past-due paper; the best they can do is to loan the money on past-due paper, and hypothecate the past-due paper as collateral security to the collateral loan. All banks have more or less past-due paper; a good bank has as little as possible; it is not good banking to have much past-due paper. I just stated that the only way we could loan money in a businesslike manner on this paper was by having a collateral note executed, and this paper hypothecated as collateral security."

Mr. Raine also testified that he wanted to give the Matt Stewart Company further time and to aid it in saving harmless the indorsers on its notes.

Mr. Raine further testified as follows:

"Q. Was this to be the Mercantile Bank's paper, that is, the two \$1,600 notes, after it was taken up by you, or was it to be the Matt Stewart Company's paper?

"A. How could it be the Matt Stewart Company's paper?

"Q. The Mercantile Bank paid the money for the paper?

"A. Certainly.

"Q. And it was the Mercantile Bank's paper?

"A. Until the debt was paid."

Mr. Hays testified as follows:

Hunter v. Matt Stewart Co.

"Well, according to my recollection about the transaction is just this: That to keep the indorsers from being sued and the company on the two \$1,600 notes held by Judge Scruggs for the Security Bank, we saw Mr. Hunter Raine at the Mercantile Bank and asked him to let us have the money to take these two notes up with. He thought well of the company, and he said he would let us have the money to take the notes up on the 'condition,' used that word, if we would bring the notes back alive so that we could put them as security for the money."

Mr. Raine and Mr. Hays both testify that the two \$1,600 notes were to remain alive and become collateral to the \$3,537.20 note. This testimony is not controverted.

Without quoting further from the evidence, we think the testimony shows that: First, Mr. Raine thought that the future of the Matt Stewart Company was bright and that if given a little time it would pay out and save the indorsers. Second, that the two \$1,600 notes were well secured. Third, that it undertook to purchase these two notes, and that it did not intend to pay them off. Hays and Stewart were its agents in taking up these notes, and the fact that they deposited the money to the credit of the company and gave its check, instead of taking the money to the holder of the notes, did not change the result.

A transaction of this nature is always governed by the intention of the parties.

Cussen v. Brandt, 97 Va., 1, 32 S. E., 791, 75 Am. St. Rep., 762, was a case where a third party took up notes for investment at a bank in which same had been

Hunter v. Matt Stewart Co.

placed for collection. The question presented was whether this action worked a payment of the notes, or did the third party so acquiring the notes become a purchaser of them?

Says the court (97 Va., 7, 32 S. E., 793, 75 Am. St. Rep., 762):

"Whether a transaction like this is a payment or a purchase is a question of intention—of fact rather than of law—and is to be settled by the evidence. *Wood v. Guarantee, etc., Co.*, 128 U. S., 416 [9 Sup. Ct., 131, 32 L. Ed., 472]."

And on page 8 of 97 Va., on page 793 of 32 S. E. (75 Am. St. Rep., 762), said court says further:

"The authorities hold that a transaction like that under consideration is a purchase, and not a payment. It was said by the supreme court of the United States, in a case similar to this upon the question under consideration, that 'in cases like that before us, where the intention is to continue the existence of the note and not to cancel it by payment is made evident, when the money is paid to the collecting agent appointed to receive it, and the owner of the note receives the amount due to him, the authorities sustain the transaction as a purchase.' *Dodge v. Freedman Savings & Trust Co.*, 93 U. S., 379 [123 L. Ed., 920]; . . . *Carter v. Burr*, 113 U. S., 737 [5 Sup. Ct., 713, 28 L. Ed., 1147]; *Swipe v. Leffingwell*, 72 Mo., 348; *McDonnell v. Burns* [83 Fed., 866] 28 C. C. A., 174; *Brice's Appeal*, 95 Pa., 150."

In *Johnston v. Schnabaum*, 86 Ark., 82, 109 S. W., 1163, 17 L. R. A. (N. S.), 838, 15 Ann. Cas., 876, it is said:

Hunter v. Matt Stewart Co.

"Appellee was a stranger to the contract represented by the note, and a payment by him of the amount and delivery to him of the note will be held to be a purchase until an intention to the contrary is shown." 7 Am. & Eng. Ency. Law, 1025.

In *Hirsch v. People's Bank of Plaquemine, La.* (1917, United States Circuit Court of Appeals), 240 Fed., 664, 153 C. C. A., 459, the court said:

"The rule invoked does not stand in the way of even the maker of matured notes, or one who has assumed the obligation of the maker, arranging for a transfer of them from a holder who is unwilling to grant a desired extension of the time of payment to one who consents to buy and hold them as an investment. The maker may act as an intermediary in carrying out such an arrangement when made, as by procuring a third person to pay the transferor the consideration for the transfer prior to the time when the agreed transfer is to be consummated by the transferee paying the consideration and taking the notes. Where, as in this case, all the parties to the transaction . . . intended a purchase by Mr. Hirsch of the notes held by Dr. Hollowell, with the security unimpaired, and understood at the time that this result was accomplished by what was done, the transaction is to be given effect as a purchase without regard to the mode adopted to accomplish the intended result."

In 7 Cyc., 1025, it is said:

"If a bill or note is paid after its maturity by a stranger to the paper, it will in general be held to be a purchase and not a payment of the instrument. Whether it is a payment or a purchase is, however, a

Hunter v. Matt Stewart Co.

question of intention to be determined as a fact from the acts and declarations of the parties and the surrounding circumstances. (Citing many cases.) If the parties to the transaction clearly intended to purchase, it will operate as such without regard to the mode adopted of accomplishing the result."

In 8 Corpus Juris, 583, it is said:

"On the other hand, where a third person purchases a note in good faith, as for an investment, the fact that the purchase is made for him by the maker as his agent does not extinguish the note either as to the maker or as to a surety; and the fact that a note, after having been put into circulation by the maker for value, comes into the hands of the latter as an agent of a third party, will not defeat recovery thereon by the latter."

Again in 8 Corpus Juris, 581, it is said:

"The possession of an instrument by the party obligated to pay the same is evidence of payment, and possession by a stranger is *prima-facie* evidence of indebtedness."

We are therefore of the opinion that the Mercantile Bank became the purchaser and owner of the two \$1,600 notes after their maturity.

There was no express agreement for delay or extension of time as to the old notes. There was no agreement that the new note should be accepted in payment of the old notes. The agreement was that the old notes should remain alive and be attached as collateral to the new note, which was done. It is manifest from the evidence that the purpose in taking the new note was to avoid carrying past-due paper, and to

Hunter v. Matt Stewart Co.

give the maker further indulgence and at the same time to hold the indorsers on the old notes liable.

Under our Negotiable Instruments Act (Laws 1899, chapter 94), as construed in *Meredith v. Dibrell*, 127 Tenn., 387, 155 S. W., 163, 46 L. R. A. (N. S.), 92 Ann. Cas., 1914 B, 1079, this could have been accomplished either by agreement on the part of the indorsers or by expressly reserving, at the time the new note was taken, all of its rights against the indorsers. It is admitted that there was no agreement on the part of the indorsers to this arrangement.

The remaining question, therefore, is: Were the rights of the bank against these indorsers expressly reserved within the meaning of the Negotiable Instruments Act?

In *Meredith v. Dibrell*, supra, the court quoted approvingly from *Morgan v. Smith*, 70 N. Y., 537, as follows:

"The ground upon which a surety is held discharged when further time for payment is given the principal debtor is that the rights of the surety are varied, as he cannot then, when the debt is due and payable, make payment, and thus put himself in the place of the creditor according to the original implied contract, and enforce repayment from the principal. Where the remedies of the creditor are reserved against the sureties, notwithstanding the new agreement with the principal, the situation of the parties is not varied, and the rule does not apply. When the creditor proceeds against the surety in such case, and the surety pays, he is then entitled to the place of creditor, as it was originally, and may in turn enforce

Hunter v. Matt Stewart Co.

the principal, who may not set up against the surety the new arrangement with the creditor."

While the bank, speaking through its agent and officer, Mr. Raine, did not use the exact words of the act, by taking the new note, with the express understanding that the old notes were to remain alive and become collateral to the new, the bank insists that it just as effectively reserved its rights as if it had said, "All rights against the indorsers on the old notes are expressly reserved." In other words, if the old notes continued to be alive, there was nothing to prevent the bank from suing on them at any time.

We are of the opinion that this insistence of the bank is well taken. We see no reason why the parties could not make an agreement of this nature. It is not necessary for us to pass upon the question as to whether the bank could sue the maker before the new note became due. What we hold is that the bank could have sued the indorsers on the old notes at any time, or the indorsers could have paid these notes at any time, and in either event immediately sued the maker. How could the maker have defended such an action by saying that it had been granted an extension of time, when at the time of the extension it had agreed that the old notes should remain alive, which meant, in legal effect, they being past due, that the holder could sue thereon at any time? The maker, having obtained this extension or renewal on its agreement that the old notes should remain alive and become collateral to the new note, would be estopped to make such a defense. To hold otherwise would be to hold that this plain, positive agreement of the parties was without force or effect and

Hunter v. Matt Stewart Co.

amounted to absolutely nothing. It should be remembered that one of the \$1,600 notes waived protest, and the other one had been duly protested.

We have found one rather late case that is in point, the case of *National Park Bank of New York v. Koehler*, 137 App. Div., 785, 122 N. Y. Supp., 490, which we copy in full, but, before doing so, call attention to the fact that the Negotiable Instruments Act of New York is the same as ours. Said opinion follows:

"This suit is brought against the defendant as indorser of a promissory note for \$15,000, made on the 22d day of March, 1907, by the Para Recovery Company, a corporation, and discounted by the plaintiff. Shortly before the maturity of that note, the maker requested an extension or renewal, proposing to give new notes maturing at intervals, indorsed by its president instead of by the defendant, giving as a reason for not procuring the indorsement of the latter that he was out of the country and might not return within two or three months. In reply to that, the plaintiff refused to accept new notes, not indorsed by the defendant, giving as a reason that the loan was made on his responsibility. In reply to that, the maker again wrote the plaintiff inclosing the proposed new notes, indorsed by its president, and saying:

" 'In the meantime, we can only assure you that we will pay the notes as they fall due and we suggest that you hold the old note with Mr. Koehler's indorsement as collateral until the new notes are paid, as a way out of the difficulty.'

"Thereupon and on the 22d day of July, 1907, the date of the maturity of the note in suit, the proceeds

Hunter v. Matt Stewart Co.

of the new notes were credited, and the note in suit was charged on the plaintiff's books to the account of the maker. At the same time, the note in suit was protested for nonpayment and due notice thereof given to the defendant.

"The question is whether the legal effect of the transaction above outlined was an unconditional extension of time, granted by the plaintiff to the principal debtor. Plainly, the note in suit was not paid. The bookkeeping entries made by the plaintiff for convenience are of little significance. The protest of the old note and the giving of notice thereof are very significant, and show an unmistakable intention on the plaintiff's part to reserve its rights against the defendant. Were there nothing in the case but the letter, containing the statement above quoted, and the acceptance by the plaintiff of the notes therewith sent, it might be difficult to escape the conclusion that the transaction operated to suspend the right to sue on the old note until the maturity of the new (*Place v. McIlvan*, 38 N. Y., 96, 97 Am. Dec., 777); but that statement must be read in the light of the plaintiff's previous unequivocal refusal to accept new notes not indorsed by the defendant, and its subsequent protest of the note in suit and giving notice thereof. It seems to me that the fair inference from the entire transaction is that the plaintiff absolutely reserved its right to proceed forthwith against the defendant, and that the extension of time was conditional upon the defendant's consent. It is to be noted that the statement, above quoted, says that the note with the defendant's indorsement is to be held 'until the new notes are paid,' not that it is to be held until they are

Hunter v. Matt Stewart Co.

due. As all rights against the surety were reserved, if he did not consent, the notes might have to be paid before they were in terms due. There can be no doubt that both parties understood that the new notes were accepted subject to the preservation of the defendant's liability as indorser, and it is difficult to believe that they did not know the familiar rule that an unconditional extension granted the principal without the surety's consent discharges the latter. Of course, the last suggestion could not be considered in the face of an unequivocal agreement to extend the time, but in this case no such agreement is to be found. What the parties intended has to be inferred from the entire transaction, from words and acts, and I do not think it can be said as matter of law that they intended an unconditional extension. The notice or protest informed the defendant that he was to be held liable on his indorsement. He could then have taken up the note and sued the maker, and I think it was at least a question of fact whether the parties did not intend to reserve his right to do that, to make the acceptance of the new notes by the plaintiff subject to that right.

"It seems profitless to discuss the authorities, as the rules of law are well settled. Each case turns on the intention of the parties, which is a question of law, if their acts and words are unequivocal; a question of fact, if different inferences may be drawn. *National Bank of Newburgh v. Bigler*, 83 N. Y., 51, and cases therein cited on page 66 of the opinion, support the conclusion which I have reached.

"The judgment should be affirmed, with costs."

Hunter v. Matt Stewart Co.

We think the agreement in the instant case to keep the old notes alive showed an unmistakable intention on the part of the bank to reserve its rights against the indorsers just as much so as the protest of the note in the Koehler Case showed such intention.

We are therefore of the opinion that the chancellor was correct in holding that the defendants were liable, and his decree is in all things affirmed, with costs.

Munson v. State.

JOE MUNSON v. THE STATE.

(Jackson, April Term, 1919.)

1. CRIMINAL LAW. Reversal. Technical error. Constitutional rights.

Notwithstanding Shannon's Code, section 6351a1, forbidding reversal except for error affecting the merits, there may be such violation or disregard of some constitutional right of the accused not affecting the merits that would induce the court to order a new trial. (*Post*, pp. 524, 525.)

Acts cited and construed: Acts 1911, ch. 32.

Cases cited and approved: *Manier v. State*, 65 Tenn., 602; *Newman v. State*, 65 Tenn., 164; *Huddleston v. State*, 60 Tenn., 110; *State v. Missio*, 105 Tenn., 219; *Elijah Duncan v. State*, 66 Tenn., 387; *Harness v. State*, 126 Tenn., 365; *Hamblin v. State*, 126 Tenn., 394; *Lauter-Lee v. State*, 132 Tenn., 655.

Codes cited and construed: Sec. 7186 (T.-S.); Sec. 6351a1(S.).

2. CRIMINAL LAW. Reversal. Technical error.

Where evidence sustained conviction of voluntary manslaughter, court's action in orally charging that jury was not concerned with fixing punishment since punishment was fixed by law, in violation of Thompson's Shannon's Code, section 7186, requiring instructions to be in writing, was not reversible error, under section 6351a1, being mere technical error which did not affect judgment, and being correct statement of law under sections 4604, 4645, 7210a9, and 7210a10. (*Post*, pp. 525, 526.)

3. CRIMINAL LAW. Written instructions. Felony cases.

The practice of orally charging juries in felony cases is not to be encouraged, and trial judges should in every case reduce their charges to writing. (*Post*, p. 526.)

4. CRIMINAL LAW. Appeal. Harmless error. Validity of statute.

Acts 1911, chapter 32 (Shannon's Code, section 6351a1), forbidding reversal except for error affecting the merits, is valid. (*Post*, p. 526.)

Munson v. State.

FROM SHELBY.

Appeal from the Criminal Court of Shelby County.
—HON. W. P. BIGGS, Special Judge.

W. B. ROSENFIELD, for plaintiff.

CHARLES L. CORNELIUS, Assistant Attorney-General,
for the State.

MR. CHIEF JUSTICE LANSDEN delivered the opinion of
the Court.

Munson was convicted in the criminal court of Shelby county of voluntary manslaughter, and has appealed. There is an agreement in the bill of exceptions that the conviction was warranted by the facts, and that the proceedings were regular, except that the presiding judge made a statement to the jury which was not in writing. This oral statement forms the basis of the only assignment of error.

In his regular charge, which was in writing, the judge told the jury, in substance, that, if they convicted the defendant of voluntary manslaughter, they would fix his punishment at confinement in the penitentiary from two to ten years. After the case was given to the jury and after they had considered of their verdict, they returned, and a member of the jury requested further instructions upon this point. The judge then stated to them orally that they had nothing to do with fixing the punishment of defendant, if they found

Munson v. State.

him guilty of manslaughter; that his punishment was fixed by the law. Later the jury returned a verdict of guilty of manslaughter.

The statute provides as follows:

"On the trial of all felonies, every word of the judge's charge shall be reduced to writing before given to the jury, and no part of it whatever shall be delivered orally in any such case, but shall be delivered wholly in writing. Every word of the charge shall be written, and read from the writing, which shall be filed with the papers, and the jury shall take it out with them upon their retirement." Thompson-Shannon's Code, section 7186.

This statute has been construed by this court to be an imperative direction to the courts to reduce to writing every word of their charge to the jury in all felony cases. *Manier v. State*, 6 Baxt., 602; *Newman v. State*, 6 Baxt., 164; *Huddleston v. State*, 1 Baxt., 110; *State v. Missio*, 105 Tenn., 219, 58 S. W., 216; *Elijah Duncan v. State*, 7 Baxt., 387.

These cases show that this court has strictly construed the statute, and has required a strict compliance with its terms. But since the foregoing cases were decided, the legislature has enacted chapter 32, Acts of 1911 (Shannon's Code, section 6351a1). This statute forbids a reversal of any case coming to this court for any error in any part of the procedure below unless this court is of opinion, after an examination of the entire record, that the error complained of affected the merits. The statute has been construed in a number of cases, among which are *Harness v. State*, 126 Tenn., 365, 149 S. W., 911, *Hamblin v. State*, 126 Tenn.,

Munson v. State.

394, 150 S. W., 89 and *Lauter-Lee v. State*, 132 Tenn., 655, 179 S. W., 145, L. R. A. 1916B, 963. It was declared in all those cases, as well as others, that the merits of a criminal case is the guilt or innocence of the accused. Of course, there may be such violation or disregard of some constitutional right of the accused, not affecting the merits, that would induce the court to order a new trial; but it is difficult to see how one who is guilty of the offense of which he has been convicted can justly complain at errors in procedure which had no direct or remote relation to the judgment rendered against them.

In this case the judge had committed error in his original charge by directing the jury to fix the punishment of defendant at from two to ten years, if they convicted him of voluntary manslaughter. A disagreement arose among the jurors as to their duty in this respect, and one of them, in the presence of all concerned, asked the judge what was meant in respect to this phase of the case. The judge replied orally that the jury had nothing to do with fixing the punishment in the event they convicted defendant of voluntary manslaughter, because the law fixed it at confinement in the penitentiary from two to ten years. Thompson-Shannon's Code, 4604, 4645, 7210a9, 7210a10.

Plaintiff in error cannot complain at the fact that the judge may have induced the jury to agree upon their verdict, because it is agreed by plaintiff in error that the verdict is warranted by the facts. The last statement to the jury was a correct statement of the law, and the error consists, not in the substance of what the judge said orally, but in the way which it was

Munson v. State.

said. Therefore a reversal of the case would be upon a bare technicality, which did not affect the merits and did not injuriously affect the plaintiff in error by inducing the jury to agree upon a verdict.

The practice of orally charging juries in felony cases is not to be encouraged, and trial judges should in every case reduce their charges to writing. Chapter 32, Acts 1911, *supra*, is valid and is declaratory of the previous practices of this court in criminal cases. *Harness v. State*, *supra*. But it is conceivable that errors might be committed, notwithstanding the act, for which a reversal would have to be had. But under the facts of this case we are compelled by the act to affirm it.

Affirmed.

Davis v. Auto Tire & Vulcanizing Co.

HARWELL DAVIS v. NEWSOME AUTO TIRE & VULCANIZING Co.

(Jackson. April Term, 1919.)

1. MASTER AND SERVANT. Negligence of automobile driver.

Liability of owner. Presumptions.

In action against owner of automobile for negligence of driver, proof of ownership is not sufficient to raise presumption of law that driver was owner's servant, or that he was acting within the scope of his employment at time of accident. (*Post*, p. 529.)

Cases cited and approved: *Frank v. Wright*, 140 Tenn., 538; *King v. Smythe*, 140 Tenn., 227.

2. EVIDENCE. Presumption. Proof by defendant.

The rule that defendant is required to introduce evidence which he has in his possession to rebut plaintiff's case applies only when plaintiff's proof and the legal deduction therefrom make a *prima-facie* case against defendant. (*Post*, pp. 529, 530.)

Cases cited and approved: *Western Union Tel. Co. v. Lamb*, 140 Tenn., 111; *Fisher v. Insurance Co.*, 124 Tenn., 483; *Standard Oil Co. v. State*, 117 Tenn., 618.

3. MASTER AND SERVANT: Negligence of automobile driver.

Liability of owner.

Liability of automobile owner for negligence of driver is based upon his legal control of the driver. (*Post*, p. 530.)

Cases cited and approved: *Goodman v. Wilson*, 129 Tenn., 464.

FROM SHELBY.

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—Hon. H. W. LAUGHLIN, Judge.

Davis v. Auto Tire & Vulcanizing Co.

L. B. PHILLIPS, for plaintiff.

R. P. CARY, for defendant.

MR. CHIEF JUSTICE LANSDEN delivered the opinion of the Court.

This is an action for personal injuries sustained by plaintiff, who is an infant about six years old, *i.e.* a result of a collision with an automobile. The case was tried before a jury, which rendered a verdict in favor of plaintiff for \$3,500. The circuit judge overruled a motion for a directed verdict before the case was submitted to the jury, but after the verdict he changed his opinion about the matter and granted a directed verdict. The case was appealed to the court of civil appeals, and that court reversed the trial judge and remanded the case, with directions to the circuit court to enter a judgment for the plaintiff on the verdict. The case is before us upon petition for *certiorari*.

No question is made upon the form of procedure in the court of civil appeals, and we need not consider that question. In the brief of plaintiff below in this court, the only proposition of fact insisted upon is that the automobile which injured the plaintiff was the property of defendants and in their service at the time of the accident. There is evidence that the automobile is the property of defendants, but there is no direct evidence that it was in their service. Nor is there any direct evidence that the driver of the automobile was the servant of defendants, or that he was acting within the scope of his employment.

Davis v. Auto Tire & Vulcanizing Co.

It is insisted for plaintiff below that proof, to the effect that the car which caused the injury belonged to the defendant, raises the presumption of law that the driver of the car was defendant's servant, and that he was acting within the scope of his employment at the time of the accident. That no such presumption exists is directly held in the case of *Frank v. Wright*, 140 Tenn., 538, 205 S. W., 434. In the case of *King v. Smythe*, 140 Tenn., 227, 204 S. W., 296, L. R. A., 1918F, 293, this question was reserved. It is well known that the authorities in the various states are divided upon this question, but we think the rule in Tennessee is put at rest by the case *Frank v. Wright*. It is therefore unnecessary for us to cite or review the authorities further than to say that the cases are cited, and some of them reviewed, in *King v. Smythe* and *Frank v. Wright*.

The defendant Newsum was placed upon the stand by the plaintiff, and he was asked if the car which caused the injury to plaintiff was not his car, and if the chauffeur was not his chauffeur. He denied both questions, or at least such must be the legal effect of his answer, because he said that he did not know. Counsel for plaintiff insists that the duty devolved upon defendant to introduce proof which would rebut the unfavorable inference which might be based on the proven ownership of the car. This rule applies only when the plaintiff's proof and the legal deduction therefrom make a *prima facie* case against defendant. *Western Union Tel. Co. v. Lamb*, 140 Tenn., 111, 203 S. W., 752; *Fisher v. Insurance Co.*, 124 Tenn., 483,

Davis v. Auto Tire & Vulcanizing Co.

138 S. W., 316, Ann. Cas., 1912D, 1246; *Standard Oil Co. v. State*, 117 Tenn., 618, 100 S. W., 705, 10 L. R. A. (N. S.), 1015.

It is not necessary to state the reasons supporting the rule which proves the ownership of the car will not justify an inference of liability against defendants. The authorities seem to hold that the defendant's liability arises from his supposed control over his servant at the time of the accident. This control is not established directly or inferentially by proof only of the ownership of the car. The identity of the servant and his employment by defendant must be established by proof, as well as the ownership of the car, before it can be inferred that the servant was acting within the scope of his employment. We do not say that both of these facts may not be established by circumstances; but there must be some evidence of the ownership of the car, the identity and employment of the servant, before it can be inferred that he was acting within the scope of his employment at the time of the accident. It must not be forgotten that usually the defendant has not authorized the accident, and his liability, for it is based upon his legal control of the servant whose negligence caused it. This is the substance of the holding in the case of *Frank v. Wright*, supra, although the court assumed, rather than stated, the reason therefor. *Goodman v. Wilson*, 129 Tenn., 464, 166 S. W., 752, 51 L. R. A. (N. S.), 1116.

It results that the judgment of the court of civil appeals is reversed, and that of the circuit court is affirmed.

McFadden v. Crisler.

LUX McFADDEN *v.* J. A. CRISLER *et al.*

(Jackson. April Term, 1919.)

1. BROKERS. Authority. Cash sale. Sale on time not compliance.

An agency contract to sell land at a fixed price means a cash sale, where the contrary is not stated and does not authorize a contract for sale giving the buyer ten months in which to pay for the land or forfeit earnest money. (*Post*, p. 536.)

2. BROKERS. Exclusive agency. Right of owner to sell. Sale as revoking agency.

Where a farm was deeded to trustees who issued certificates to each of the owners showing the amount and part each paid, and they gave an exclusive agency contract to sell the land, and subsequently conveyed all the certificates to other parties, such transfer constituted a sale and revoked the agency, there being no stipulation against sale by the owners, since it is never presumed an owner has deprived himself of the right to sell. (*Post*, pp. 536, 537.)

Cases cited and approved: *Chambers v. Seay*, 73 Ala., 372; *Brown v. Pforr*, 38 Cal., 550; *McKellop v. De Witz*, 42 Okla., 220.

3. BROKERS. Authority to sell. Authority to contract to sell or make option agreement. "Sale."

An exclusive agency contract construed as authorizing a "sale," i. e., the finding of a purchaser and the consummation of a deal, and not to authorize a contract to sell or an option agreement for sale of the land. (*Post*, p. 537.)

Cases cited and approved: *Weatherhead v. Ettinger*, 78 Ohio St., 104; *Jasper v. Wilson*, 14 N. M., 482; *Trogden v. Williams*, 144 N. C., 192.

4. BROKERS. Real estate brokers. Specific authority. Knowledge of purchaser. Construction of agency contract.

The agent's authority to sell real estate must be specific, and is generally closely construed, and the purchaser must know that

McFadden v. Crisler.

the seller is acting as agent, and not as principal, and must become aware of the agent's authority; and, where limited to sale at a fixed price per acre, the purchaser must know that the agent is without authority to make contract for sale, particularly one giving purchaser an unreasonable time to consummate the deal. (*Post*, pp. 537, 538.)

FROM SHELBY.

Appeal from the Chancery Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals, from the Supreme Court.—HON. I. H. PERES, Judge.

G. T. FITZHUGH, for complainant.

EWING, KING & KING and BURCH & MINOR, for defendants.

MR. CHIEF JUSTICE LANSDEN delivered the opinion of the Court.

The bill was filed in the chancery court of Shelby county against twenty defendants for the purpose of having a specific performance of an alleged conveyance of a certain farm situated in Shelby county. The bill was demurred to by the defendants, and the chancellor sustained the demurrer and dismissed the bill. The complainants appealed from his decree to the court of civil appeals, and in that court the chancellor was affirmed. The case is before us upon a petition for *certiorari*.

The defendants, twenty in number, bought about six hundred and thirty-two acres of farm land in Shelby

McFadden v. Crisler.

county, and had the title vested in certain trustees. Certificates were issued to the beneficial owners in the proportion in which they paid the purchase price, showing the amount paid by the certificate holder, and his interest in the land. The trustee rented the land to W. A. Johnson, and in the rental contract they constituted him their sole agent to sell the land in the following language:

"Rent for 1917—Possession Jan. 1, 1917; note payable Nov. 15, 1917, \$1,500.00, with sole agency at \$45.00, per acre, with 5 per cent. commission on sale—Agency to date from Oct. 1, 1916.

"If not sold 1917—

"Rent note for 1918, payable Nov. 15, 1918, \$1,500.00 with sole agency—to sell at \$50.00 per acre—with 5 per cent. commission on sale.

If not sold during 1918—

"Rent 1919—\$1,500.00, note payable Nov. 15, 1919, with sole agency to sell at \$55.00 per acre—5 per cent. commission on sale."

This contract was executed October 13, 1916. While this contract was in force, but before any sale or contract of sale had been made, the defendants, Smith & Crisler, acquired all of the certificates of interest in the land, and in this way became the sole owners thereof. The legal title remained in the trustees. Afterwards Johnson executed the following contract to the complainant McFadden:

"This contract, made and entered into in duplicate, by and between W. A. Johnson, agent, and E. R. Parham and Wm. White, trustees; Chas. R. Miller, John

McFadden v. Crisler.

M. Tuther, A. Barnett, et al., of the first part and Lux McFadden of the second part, witnesseth:

"That the said first party hereby agrees to sell, and said party of the second part hereby agrees to buy upon the terms, conditions and stipulations hereinafter set out certain real estate in Shelby county, Tennessee, described as follows, to wit:

"Six hundred and thirty-two and one-half (632 $\frac{1}{2}$) acres, more or less, known as the John Alsup farm, situated near Mullins Station on the N. C. & St. L. Railroad, and being the same land described in a deed in Book 438, page 205, register's office of Shelby county, Tennessee, to which reference is here made. And being the same land surveyed by H. G. Ferrees December 8, 1916, as per plat and blueprint made by him.

"The terms, conditions and stipulations above referred to are as follows:

"The consideration to be paid by said party of the second part is to be \$45 per acre, upon terms as follows:

"All cash, owners to pay taxes for the year 1917.

"Said party of the second part has deposited with W. A. Johnson, agent, through whom this sale was made, the sum of \$100 cash, as earnest money, the receipt of which is hereby acknowledged.

"Said party of the first part shall furnish abstracts of title and tax, and if required of judgments, and after the delivery of abstracts of title and taxes (thirty) 30 days shall be allowed for examination. If the title is not good and cannot be made good within ninety days after written notice that the title is defective, the earnest money shall be returned to party of the second part.

McFadden v. Crisler.

"After the examination of the title, if the same is good, said party of the first part shall execute and deliver to said party of the second part, or to any person he may name, on December 31, 1917, a warranty deed, conveying said property, and the purchaser shall at the time pay the cash consideration to the said first party.

"The said second party is purchasing said property with the knowledge and consent that W. A. Johnson has a three-year lease upon it for the years of 1917, 1918, and 1919.

"It is mutually agreed between the seller and the purchaser that while the abstracts are to be delivered without delay, it is expressly agreed and understood that the owners are to deliver the deed on December 31, 1917, and the purchase money is to be paid at that time, and that if the purchase money is not paid on December 31, 1917, upon the tender of a valid warranty deed, the said earnest money is to be forfeited to the party of the first part.

"It is agreed and understood that W. A. Johnson is to be paid five per cent. commission on the amount of the purchase price by the present owner when the trade is closed; and that the said W. A. Johnson is to give possession of the land and cancel his lease on December 31, 1917, and the present owners are to have the rent for year 1917."

The demurrs to the bill raise the general proposition that defendants did not authorize Johnson to make the foregoing contract, and, if they did, it was revoked before he made it. Of course, either proposition being

McFadden v. Crisler.

settled in favor of defendants, the complainant's suit must fail.

We think it entirely clear that the contract of sole agency conferred by the owners upon defendant Johnson did not authorize him to make a contract of sale of any kind, and especially a contract of sale upon time. The contract gave the complainant McFadden about ten months in which to pay for the land or the \$100 of earnest money paid at the time of the contract, and gave the defendants only thirty days in which to prepare their title papers.

Authority to sell land at a price fixed by the owner means a sale for cash, unless the contrary is stated. This must be so necessarily because the owner, having placed a value in dollars upon his land, is entitled to receive the amount at which he fixes the value of the land. 31 Cyc., 1215.

Nor would the fact that Johnson had the sole agency for the sale of the farm prevent the owners from selling themselves. There was no stipulation in the contract of agency to this effect, and it is never presumed that the owner of property has deprived himself of the right to sell it. Mechem on Agency, section 2445. This being true, and Johnson having no interest in the property coupled with his contract, the act of selling the property *ipso facto* operated to revoke the agency because Johnson knew of the sale to defendants Smith & Crisler before he entered into the alleged contract with compliments. Mechem on Agency, sections 570, 560, 413; 31 Cyc., 1300, and authorities cited; *Chambers v. Seay*, 73 Ala., 372; *Brown v. Pforr*, 38

McFadden v. Crisler.

Cal., 550; *McKellop v. De Witz*, 42 Okl., 220, 140 Pac., 1161, 52 L. R. A. (N. S.), 255.

We are also of opinion that the agency of Johnson did not authorize him to execute a contract to sell. His agency was to sell; that is, to find a purchaser and consummate a deal.

The contract which he made with McFadden does not compel McFadden to purchase, and in addition gives him about ten months in which to pay the price fixed by the owners. Johnson merely conveyed to McFadden the right to buy, or to forfeit \$100 for ten months' time in which to decide whether he would buy. It is immaterial whether this contract between Johnson and McFadden be called an option or a contract to sell. We think it is plain that the contract does not comply with the terms of Johnson's agency. *Weatherhead v. Ettinger*, 78 Ohio St., 104, 84 N. E., 598, 17 L. R. A. (N. S.), 211, and note; *Jasper v. Wilson*, 14 N. M., 482, 94 Pac., 951, 23 L. R. A. (N. S.), 982, and note; *Trogden v. Williams*, 144 N. C., 192, 56 S. E., 865, 10 L. R. A. (N. S.), 867, and note.

We have examined some of the many cases cited upon the brief for petitioner, and we think they are not controlling. There is a difference between contracts of sale made by the owner of land and contracts of sale made by agents. In the first case the inquiry is if the minds of the parties met, whereas in the second case the chief inquiry always is if the contract made by the agent is authorized by his principal. The authority of the agent to sell real estate must be specific, and is generally closely construed. This is shown by the authorities just cited, if, indeed, authority is needed

McFadden v. Crisler.

for so plain a proposition. The purchaser of land from an agent must know that the proposed seller is acting as an agent and not as principal, and therefore must become aware of the agent's authority to sell. If he finds that the agent is authorized to sell for so many dollars per acre, he must know that this does not include authority to make a contract of sale at all, and especially one which gives him an unreasonable length of time in which to consummate the deal. There is nothing in the power conferred upon Johnson which authorizes him to do this.

Hence we conclude that the sale of the property by the true owners before Johnson made the alleged contract with McFadden necessarily releases them from any claim which McFadden could prefer against them. At the time Johnson made the alleged contract with complainants, he was not the agent of the previous owner to sell the property, because they did not own it. We do not see how he could be thought the agent of Smith & Crisler, because they had never appointed him. We, therefore, conclude that complainant has no right to a decree for the specific performance of his contract.

In what has been said it must be borne in mind that we are considering the equitable remedy of specific performance, and the power of the owners to revoke the contract by the sale to Smith & Crisler. We have not considered their right to do so, nor Johnson's remedy in case there had been a wrongful revocation of his authority.

The writ is denied.

State v. Costen.

THE STATE *v.* C. C. COSTEN.

SAME *v.* RAYMOND BRYANT.

(*Jackson.* April Term, 1919.)

1. CONSTITUTIONAL LAW. Judicial power. Legislative invasion.

A joint resolution of legislature, directing the discharge of a defendant indicted for a crime, is an invasion of the judicial power by the legislature. (*Post, pp. 544, 545.*)

Case cited and approved: State *v.* Fleming, 26 Tenn., 152.

2. JUDGES. Duty of judge. Impartiality.

In a criminal prosecution, the judge does not represent the State in the prosecution of the criminal, but should judge fairly and impartially of the complaint of the State against the defendant and of the defense or defenses made thereto. (*Post, pp. 545, 546.*)

3. CRIMINAL LAW. "Nolle prosequi."

A "nolle prosequi," is a formal entry of record by the attorney general, by which he declares that he will no longer prosecute the case. (*Post, pp. 545, 546.*)

4. CONSTITUTIONAL LAW. Policy of statute.

The court is not concerned with the policy of a statute. (*Post, pp. 545, 546.*)

5. CRIMINAL LAW. Indictment and information. Amendment.

Nolle prosequi.

Where indictment charging embezzlement incorrectly stated facts relating to the ownership of the property, the attorney-general should have recommitted the indictment and had it amended, and should not have filed a *nolle prosequi*. (*Post, p. 546.*)

Cases cited and approved: Hite *v.* State, 17 Tenn., 203; McKinley *v.* State, 27 Tenn., 73; State *v.* Hughes, 31 Tenn., 261; State *v.* Davidson, 42 Tenn., 184; State *v.* Willis, 40 Tenn., 157; Lawless *v.* State, 72 Tenn., 178; De Berry *v.* State, 99 Tenn., 207.

State v. Costen.

6. CONSTITUTIONAL LAW. *Nolle prosequi*. Exercise of pardoning power.

The action of the attorney-general in recommending a *nolle prosequi* upon ground that defendant had served in the army since the filing of the presentment, and had been honorably discharged, and the action of the court in granting the *nolle prosequi* was an attempt to exercise pardoning power, vested in the Governor under Constitution, article 3, section 6. (*Post*, pp. 546, 547.)

Constitution cited and construed: Const. Art. 3, sec. 6.

7. CONSTITUTIONAL LAW. Legislative acts. Encroachment. *Nolle prosequi*.

Senate Bill No. 141, prohibiting the discharge of indicted defendant, except by acquittal without requiring him to pay, secure, or work out in the workhouse all the costs, fees, and penalties, is not unconstitutional by interfering in sections 1 and 4 with judicial discretion and functions of the court in violation of Constitution, article 6, section 1, or in controlling the ministerial acts of the attorney-general and the judges; the judge having no participation in filing of *nolle prosequi* except to give his consent to such order and permit its entry upon the record, and the attorney-general having no constitutional right to file *nolle prosequi*. (*Post*, p. 547.)

FROM CARROLL.

Appeal from the Circuit Court of Carroll County.
—Hon. THOS. E. HARWOOD, Judge.

Wm. H. SWIGGART, JR., Assistant Attorney-General,
for the State.

None of record for defendant.

State v. Costen.

MR. CHIEF JUSTICE LANSDEN delivered the opinion of the Court.

These cases involve the validity of Senate Bill No. 141, prohibiting "judges from pronouncing, and district attorneys-general from consenting to, any judgment in any criminal case by which the defendant, except when acquitted, is or can be discharged without being required to pay, secure or work out in the workhouse all of the costs, fees and penalties."

In the case of Costen there was an indictment for embezzlement, and the attorney-general stated to the court when the case was called for trial that he desired to enter a *nolle prosequi*, because the forms of the indictment were incorrect in regard to the ownership of the property which the indictment charged that Costen had embezzled; and stated that another indictment, containing a corrected description of the property, would be returned by the grand jury. He also stated that the additional indictment had been prepared and was before the grand jury for consideration, and that it contained two or more counts, averring intent to defraud the true owners. That under the proof as developed before the grand jury, the state will be able to show the defendant guilty of embezzlement, and to go to trial on the present indictment might, and probably would, seriously affect the success of the State. He stated his opinion to be that this was really a proper case for a *nolle prosequi*. The defendant objected to this procedure, and insisted upon a trial or an agreed verdict of not guilty, and invoked the authority of the statute under consideration. In reply the attorney-

State v. Costen.

general insisted that the first and fourth sections of this act are unconstitutional, and violate article 6, section 1, of the Constitution of Tennessee; that they undertake to interfere with, and control, the judicial discretion and functions of the courts. He also insisted that the second section of the act undertakes to control the ministerial acts of the attorneys general and the judges, and to direct their course in each and every case without regard to the proof and facts, and deprive them of the ministerial and judicial powers rightfully and justly due them in co-operating and concurring with one another in their judicial and ministerial functions, and such co-operation, because of their detailed knowledge of the facts and circumstances in each case, is absolutely essential to the proper administration of justice. And also that the act requires at the hands of the attorney-general, except in cases of acquittals, that the defendant be required to pay the cost accrued or work out the same.

The court held that the act was void in so far as it undertakes to abridge or interfere with the judicial power and discretion of the court, and "accordingly enters a *nolle prosequi* herein." The defendant was thereupon discharged, and the State was taxed with the cost of the case in its behalf.

In the case of Bryant the record recites "that it appeared in open court that the defendant had been in service of the United States army, and after six months service since the finding of the presentment of this case had been honorably discharged from the army." The attorney-general stated that he would recommend to the court to let this case be *nolled* if he

State v. Costen.

had the power to do so, and thereupon the court directed that a *nolle prosequi* be entered.

The act is as follows:

"An act prohibiting judges from pronouncing, and district attorneys-general from consenting to, any criminal case by which the defendant, except when acquitted, is or can be discharged without being required to pay, secure or work out in the workhouse all of the costs, fees and penalties accruing therein, and providing penalties for the violation of this act.

"Section 1. Be it enacted by the general-assembly of the State of Tennessee, that it shall be unlawful for any judge in this State in any criminal case to pronounce or allow to be entered any judgment by which any defendant is or may be discharged, except when acquitted, unless said defendant is required to pay, or secure, or work out in the workhouse all costs, penalties and other fees for expenses chargeable by law to the defendant.

"Sec. 2. Be it further enacted, that it shall be unlawful for any district attorney-general of this State to consent to any judgment by which any defendant is or may be discharged except when he is acquitted, unless and until said defendant is required to pay or secure or work out in the workhouse all costs, penalties and other fees for expenses chargeable to the defendant by law.

"Sec. 3. Be it further enacted, that if any judge pronounces any judgment in violation of the provisions of this act, it shall be the duty of the district attorney-general to appeal therefrom to the supreme court.

State v. Costen.

"Sec. 4. Be it further enacted, that any judge or district attorney-general violating any of the provisions of this act shall be guilty of a misdemeanor in office, subjecting him to removal therefrom and the comptroller of the treasury is authorized and directed to deduct from his salary any sum or sums that may be lost by reason of this failure therein.

"Sec. 5. Be it further enacted, that all laws and parts of laws, in conflict with this act be and are hereby repealed, and that this act take effect from and after its passage, the public welfare requiring it."

It has been held in this State that the legislature cannot direct the discharge of a defendant by joint resolution who stands indicted of crime in a court of justice. This is an invasion of the judicial power by the legislature. *State v. Fleming*, 7 Humph., 152, 46 Am. Dec., 73.

These cases present the reverse question of the *Fleming Case*. They involve the power of the legislature to forbid a discontinuance of any criminal case without the payment of the costs, fees, and penalties accruing in the case. The statute forbids the attorney-general from consenting to such dismissal, and the judge from entering, from pronouncing or allowing to be entered such judgment. The act is confined to criminal prosecutions.

The State under its police power has enacted the Criminal Code, and preserves law and order by the enforcement of this Code. The people by the adoption of the present Constitution created the Criminal Codes as a means of bringing offenders to justice, and of acquitting those who are wrongfully indicted or presented. The State, that is, the sovereignty of all the people,

State v. Costen.

is the prosecutor. The district attorney is selected as the representative of the State in criminal prosecutions. He is not the prosecutor, and he cannot operate apart from the Constitution and the laws. He has no judicial power, and his ministerial power must be responsive to the direction of the State, which is his client.

This cannot be said of the judge in such broad terms. However, the judge does not represent the State in the prosecution of criminals in any sense. He has only to judge fairly and impartially of the complaint of the State against the defendant and of the defense, or defenses, made thereto. A *nolle prosequi* is a formal entry of record by the attorney-general by which he declares that he will no longer prosecute the case. 12 Cyc., 374. He does this as the attorney-general for the State. The judge has no participation in it, except to give his consent to such order, and permit its entry upon the record. We are not unmindful of the fact that this power has been exercised by the attorneys-general in this State for many years, but the right to so exercise it is not conferred by the Constitution. The legislature, therefore, has the power to take it away, and when it does so it is not an interference, in a constitutional sense, either with the judicial power of the State, or the ministerial duties of the attorneys-general. With the policy of the statute neither we nor the attorneys-general have anything to do. It is a plain mandate of the legislature to which we must all bow.

Manifestly the purpose of the statute is to make those accused of crime pay the expenses of the prosecution, or receive a verdict of not guilty at the hands

State v. Costen.

of the jury. It is quite recent history in this State that the abuse of the power, heretofore lodged in attorneys-general, to *nolle prosequi* a case, and to enter consent forms of not guilty, has been a source of serious disturbance. It caused in part the impeachment of one judge, and has inflicted serious criminal costs upon the State. By this statute the State merely says that before it can be adjudged to pay criminal costs the defendant must be first adjudged to be not guilty. It directs its attorney in the prosecution of such cases not to enter a *nolle prosequi*.

The case of Costen, as made in the record, does not present any obstacle to this conclusion. The attorney-general stated in open court that the indictment incorrectly stated the facts relating to the ownership of the property, and for that reason he desired to enter a *nolle prosequi*. He should have recommitted his indictment, and had it amended so as to correctly conform to the facts. *Hite v. State*, 9 Yerg., 203, *McKinley v. State*, 8 Humph., 73; *State v. Hughes*, 1 Swan., 261; *State v. Davidson*, 2 Cold., 184; *State v. Willis*, 3 Head., 157; *Lawless v. State*, 4 Lea, 178; *De Berry v. State*, 99 Tenn., 207, 42 S. W., 31. A *nolle prosequi* is not the proper practice in such instances, and the practice of recommitting indictments for amendments has been followed in this State for many years.

In the case of Bryant, the attorney-general merely stated that he would recommend a *nolle prosequi* if he had the power, and the judge thereupon directed that one be entered. The reason assigned for the discontinuance of the case was that Bryant had served in the army for six months since the finding of the present-

State v. Costen.

ment, and had been honorably discharged. It will be observed that these facts do not relate to Bryant's guilt or innocence. They have no bearing whatever upon the alleged fact that he was guilty of gaming. The action of the attorney-general in recommending, and the judge in granting, the *nolle* seems to have been a plain case of an attempt upon their part to exercise the pardoning power. This power does not belong to them, and never did, and has always belonged to the Governor under the Constitution. Constitution, article 3, section 6.

Therefore we are of opinion that the act in controversy is valid and constitutional, and the cases are reversed and remanded for trial.

Gamble v. Paine.

J. H. GAMBLE *et al.*, Road Com'rs *v.* R. B. PAINE.

(Jackson. April Term, 1919.)

1. COUNTIES. Appropriation of funds. Damages for condemnation of land. County court. "May."

Acts 1907, chapter 323, providing that quarterly county court "may" appropriate out of the general funds of the county moneys for payments of any damages found to be due landowners, or others suffering from the action of the "Tipton county road commissioners in condemning land," means that county court "shall" make such appropriation. (*Post.* p. 550.)

Acts cited and construed: Acts 1907, ch. 323.

2. EMINENT DOMAIN. Power of road commissioners. Condemnation of land. Relocation of road.

Acts 1907, chapter 323, empowering Tipton county road commissioners "to condemn lands for purpose of widening or straightening roads, or reducing or avoiding grades, hills or marshy places," and authorizing county court to appropriate county moneys out of general funds for payment of landowner's damages, *held* to confer upon commissioners' jurisdiction of county roads, with power to relocate roads, and by exercise of eminent domain condemn land for such purpose. (*Post*, pp. 550, 551.)

3. EMINENT DOMAIN. Relocation of road. Necessity for relocation. Conclusiveness of county court's determination.

Under Acts 1907, chapter 323, the legislature has delegated to Tipton county road commissioners the question of the necessity for or advisability of taking land in county for road purposes, subject to supervision of quarterly county court, the action of county court being conclusive, in absence of a strong showing of fraud or oppression, and circuit court on appeal therefrom being concerned only with judicial questions, with no right to try matter *de novo*. (*Post*, pp. 551, 552.)

Cases cited and approved: Railroad *v.* Memphis, 126 Tenn., 267; Railroad *v.* Mayor and Aldermen of Union City, 137 Tenn., 500.

Gamble v. Paine.

FROM TIPTON.

Appeal from the Circuit Court of Tipton County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—HON. S. J. EVERETT, Judge.

SIMONTON & GWINN, for plaintiffs.

OWEN & BRINGLE, for defendants.

MR. JUSTICE GREEN delivered the opinion of the Court.

This is a proceeding by the road commissioners of Tipton county to relocate one of their public roads. The defendant Paine, the landowner affected, questioned the propriety of the change. The commissioners determined upon the change, and the county court of Tipton county confirmed the action of the commissioners. Paine then appealed to the circuit court, which reversed the action of the county court, and upon appeal of the commissioners to the court of civil appeals the judgment of the circuit court was affirmed. The case has been brought here by petition for *certiorari* and argued in this court.

The Tipton county road commission was created by chapter 323 of the Acts of 1907, and its duties and powers defined by that act and subsequent amendments.

Gamble v. Paine.

The road commissioners were given power, after notice to landowners, to condemn lands for the purpose of widening or straightening roads, or reducing or avoiding grades, hills, or marshy places. The commissioners were required to report their action to the next term of the quarterly county court, including in said report their assessment of damages, and the county court was authorized by the statute to "hear and determine all questions arising out of any report of such commissioners," and to "make such orders with reference to the approval, confirmation, or rejection of any report as to said court may seem right and proper in the premises, and may appropriate out of the general funds of the county moneys for the payment of any damages found to be due landowners, or others suffering from the action of the commissioners in such cases." The statute further provided for an appeal by any person aggrieved from the county court to the circuit court.

The provision in the above statute that the county court may appropriate moneys for payment of damages found to be due landowners must, of course, be read that the county court shall make such an appropriation.

These statutes so read merely confer upon the road commissioners of Tipton county jurisdiction of the county roads, with the power to relocate same, and for the furtherance of such purpose confer on that commission the right to acquire the land necessary by the exercise of the power of eminent domain. All of this is to be under the supervision of the quarterly county court.

Gamble v. Paine.

Testimony introduced by the defendant below merely went to the question of the advisability or necessity of the proposed change in the location of this road. Upon this testimony the circuit judge seems to have tried this whole matter *de novo*, and to have concluded that there was no necessity for the relocation.

In so considering this controversy we think the circuit judge was in error, and likewise the court of civil appeals.

Although there is some uncertainty in earlier cases, this court, in *Railroad v. Memphis*, said that where property was taken for a public purpose the judicial department of the government was vested with the power to take, and the power to determine the character of the taking, and the justness of the compensation to be made, "but all other incidents of the taking are political questions, for the determination of the sovereign, and not judicial questions, for the determination of the courts. Selecting the property to be taken as contradistinguished from similar property in the same locality, determining its suitableness for the use to which it is proposed to put it, as well as deciding the quantity required, are all political questions, which inhere in and constitute the chief value of the power to take." *Railroad v. Memphis*, 126 Tenn., 267, 148 S. W., 662, 41 L. R. A. (N. S.) 828, Ann. Cas 1913E, 153.

This doctrine was expressly reaffirmed in *Railroad v. Mayor and Aldermen of Union City*, 137 Tenn., 500, 194 S. W., 572.

This power to take has been delegated by the legislature to the road commissioners of Tipton county, subject to the supervision of the quarterly county court.

Gamble v. Paine.

The quarterly county court is a legislative as well as a judicial body, and has particular functions and duties under the law with reference to the county roads. The road commissioners of Tipton county are required to report their action to the quarterly county court, and the latter tribunal may review the whole question.

We think, however, that the question of the necessity or advisability of a taking and the selection of the property to be taken is concluded when the quarterly county court acts.

The appeal provided to the circuit court was not intended by the statute to reopen such questions in the absence of a strong showing of fraud or oppression. The circuit court is concerned only with judicial questions as stated by counsel, and will not except in an extraordinary case, if ever at all, undertake to review the action of a road commission confirmed by the quarterly county court as to the necessity for a change in the county roads.

There is no real showing made by defendant in this case of any fraud or disposition to oppress him. His witnesses controvert the advisability of relocating the road. This question is certainly debatable on the proof. The evidence, indeed, proponderates in favor of the contentions of the road commissioners. At any rate, the case presents no judicial question for review in the courts.

The judgment of the court of civil appeals and the judgment of the circuit court will accordingly be reversed. This case will be remanded to the circuit court of Tipton county for further proceedings in conformity with this opinion.

Friedman v. State.

DR. BEN FRIEDMAN v. THE STATE.

(Jackson. April Term, 1919.)

POISONS. "Dispense" or "distribute" morphine. Keeping duplicate prescription.

Defendant, a practicing physician and not a salesman of morphine, who prescribed morphine for an habitual user after personally attending the user, did not "dispense" or "distribute" the drug within Acts 1913 (1st Ex. Sess.) chapter 11, requiring physicians who "dispense" or "distribute" to keep duplicates of all prescriptions issued for a period of two years.

Acts cited and construed: Acts 1913, ch. 11.

Case cited and approved: Hyde v. State, 131 Tenn., 208.

FROM SHELBY.

Error to the Criminal Court of Shelby County.—Hon. D. B. PURYEAR, Judge.

DR. BEN FRIEDMAN, for plaintiff.

CHARLES L. CORNELIUS, Assistant Attorney-General, for the State.

MR. CHIEF JUSTICE LANSDEN delivered the opinion of the Court.

The plaintiff in error was convicted in the criminal court of Shelby county, for that he "did unlawfully distribute and dispense and prescribe morphine, which was a derivative of opium, without keeping a duplicate of the prescription as prescribed by law."

Friedman v. State.

Dr. Friedman is not a salesman of the drug mentioned, and is a practicing physician. He prescribed morphine for an habitual user thereof, after personally attending the patient, but kept no copy or duplicate of the prescription. The question to be decided is whether Acts 1913 (1st Ex. Sess.) chapter 11, requires him so to do. That portion of the act which bears upon this subject is as follows:

"Physicians who shall dispense or distribute any of the aforesaid drugs provided by this act shall keep a duplicate of all prescriptions issued by them for a term of two years, and said duplicate shall be subject to inspection by any of the officers named in the preceding paragraph." Section 2.

It will be observed that it is not all physicians who are included within the provisions of this act. It is only physicians "who shall dispense or distribute any of the aforesaid drugs provided by this act, who shall keep a duplicate of all prescriptions issued by them for a term of two years." The act thus limits the number of physicians included within its terms. It is plain and unambiguous, and there is no room for construction. Therefore we hold that the plaintiff in error did not violate this section of the act when he failed to keep a duplicate of the prescription, because he did not dispense or distribute the drug.

We are unable to comprehend how plaintiff in error could be deemed a dispenser or distributor of the drug merely because he failed to preserve a duplicate of his prescription. The offense is not for issuing the prescription, because plaintiff in error complied with every requirement of the law in that respect. The offense

Friedman v. State.

charged is failure upon his part to keep a duplicate of the prescription, which he was not required to do under a proper construction of the act.

Counsel for the State ingenuously argues that the statute should be given the construction insisted upon for the State, because of supposed conveniences to the agents of the State who check up the sale of habit forming drugs. We may well admit the conveniences suggested, but a sufficient answer in law is that the statute does not include them. Therefore it cannot matter in this case what meaning is to be attributed to the words "dispense" and "distribute," because plaintiff in error is in no sense a party to a dispensation or distribution of the drug because he failed to keep a duplicate of his prescription. It was the prescription furnished the druggist upon which he acted, and not a duplicate in the hands of a physician.

The case of *Hyde v. State*, 131 Tenn., 208, 174 S. W., 1127, is in no sense in conflict with this opinion. In that case Dr. Hyde issued a prescription without attending the patient. It was held that the prescription made him an aider and abettor in the sale, although the alleged patient was not in existence.

The case is reversed and dismissed.

Crane & Co. v. Hall.

CRANE & CO. V. W. L. HALL *et al.*

(Jackson. April Term, 1919.)

1. BILLS AND NOTES. Consideration. Collateral security for pre-existing debt. "Value."

Under Negotiable Instruments Law, section 25, providing that an antecedent or pre-existing debt constitutes value, and section 27, providing that a holder who has a lien on the instrument shall be deemed a holder for value to the extent of his lien, a pre-existing debt is "value," even though the instrument is transferred merely as collateral security for such debt. (*Post*, pp. 560, 561.)

Acts cited and construed: Acts 1899, ch. 94.

Cases cited and approved: *Birket v. Elward*, 68 Kan., 295; *Exchange Nat. Bank v. Coe*, 94 Ark., 387; *German-American Bank v. Wright*, 85 Wash., 460.

2. BILLS AND NOTES. Innocent holders. Security for pre-existing debt.

Where defendant executed a note and mortgage covering land, title to which was taken in his name merely for the convenience of others actually interested, and such note was negotiated contrary to agreement, and came into the hands of plaintiff prior to maturity, without knowledge of any infirmity or defense, plaintiff was an innocent holder in due course, even though the note was taken as security for a pre-existing debt owing by the person who negotiated it in view of Negotiable Instruments Law, sections 25, 27. (*Post*, pp. 561, 562.)

Case cited and approved: *Trust Co. v. McDougald*, 132 Tenn., 323.

3. FRAUDULENT CONVEYANCES. Evidence. Presumptions.

A deed of property to grantor's wife for a recited consideration of \$5, love, and affection, shortly after the foreclosure of a trust deed executed by grantor to secure a note, leaving a large balance still due, was presumptively fraudulent. (*Post*, p. 562.)

Crane & Co. v. Hall.

4. WITNESSES. Matters occurring in consequence of marital relation.

In an action on a note and to set aside a transfer by defendant to his wife as fraudulent, evidence by defendant and his wife that the consideration in the deed was recited as being nominal merely by error of the draftsman, and that defendant was largely indebted to his wife, was properly excluded as a matter occurring between husband and wife, by virtue of or in consequence of the marital relation, under Thompson's Shannon's Code, section 5596. (*Post*, pp. 562, 563.)

Case cited and approved: Insurance Co. v. Shoemaker, 95 Tenn., 72.

Code cited and construed: Sec. 5596 (T.-S.).

5. FRAUDULENT CONVEYANCES. Evidence. Matters occurring between husband and wife.

Testimony of a husband and wife as to matters occurring between them by virtue of, or in consequence of, the marital relation, even when admitted without objection, is insufficient to set up a contract between them to the prejudice of the husband's creditors, unless corroborated. (*Post*, p. 563.)

Cases cited and approved: Gates v. Card, 93 Tenn., 334; Hardison v. Billington, 82 Tenn., 346; Grotenkemper v. Carver, 77 Tenn., 280; Page v. Gillentine, 74 Tenn., 240; Hyden v. Hyden, 65 Tenn., 406.

6. WITNESSES. Competency. Husband and wife. Statutes.

Acts 1915, chapter 161, making a husband and wife competent witnesses for or against each other, relates only to criminal cases, and even in such cases they may not testify as to their dealings had apart from others. (*Post*, pp. 563, 564.)

Acts cited and construed: Acts 1915, ch. 161.

Case cited and approved: McCormick v. State, 135 Tenn., 128.

7. WITNESSES. Competency. Husband and wife. Statute.

Married Woman's Emancipation Act of 1913 does not change the rule of evidence that matters occurring between husband and wife in consequence of the marriage relation are inadmissible as against the husband's creditors. (*Post*, p. 564.)

Crane & Co. v. Hall.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.—
Hon. F. H. Heiskell, Chancellor.

Jackson, Neil & McRee, for plaintiffs.

Ewing, King & King and Lowell W. Taylor, for defendants..

MR. JUSTICE GREEN delivered the opinion of the court.

The defendant Hall had a brother-in-law named Jones, who was in the real estate business. Jones had a business associate named Harris. Jones and Harris, on the one hand, and defendant Hall, on the other, entered into an arrangement whereby a certain lot in Memphis was purchased and the title taken in the name of Hall. Harris arranged for payment of the purchase price of the lot. Defendant Hall thereupon executed his note for \$3,500, payable to his own order, and indorsed this note in blank, and at the same time Hall executed a mortgage upon the lot to secure the payment of said note. Hall turned the note and the mortgage over to his brother-in-law, Jones, with the understanding that out of the proceeds of the note a house was to be erected upon the lot. Jones and Harris were to sell the property after the house was built. Jones says that he and Harris were to get only their commission as real estate agents for the sale, and that defendant Hall was

Crane & Co. v. Hall.

to get any profit that was made on the transaction. Hall says that he was to get nothing whatever out of the deal and only entered into it as a matter of accommodation to his brother-in-law, Jones. It seems to have been considered by all parties that the transaction could be handled better with the title to the property standing in the name of defendant Hall.

Jones' associate, Harris, had a creditor named Cockrill. Instead of using the Hall note to raise money to build a house on the lot referred to, Harris turned said note over to Cockrill, to whom he was indebted, as collateral security for Harris' own note executed to Cockrill.

Cockrill was indebted to the complainants, Crane & Co., and on account of his indebtedness turned over to Crane & Co., the note that Harris had made to him, along with the Hall note as collateral.

Harris' note, which thus came into the hands of the complainants, was not paid at maturity, and the complainants proceeded to foreclose the trust deed securing defendant Hall's note, which Crane & Co. had taken as collateral to the Harris note. The property was sold, and the proceeds credited on the Hall note. This suit is brought by complainants to recover balance due on the Hall note, and to set aside as fraudulent a certain conveyance of other property made by the defendant Hall to his wife. There was a decree for the complainants below, from which defendants Hall and wife have appealed.

It is insisted for the defendants that complainants are not holders of the Hall note for value and in due course. It is said that Crane & Co. took this Hall note as col-

Crane & Co. v. Hall.

lateral security for a past-due indebtedness, and are therefore not innocent holders. It is said that the case presents a clear diversion of the Hall note by Harris, and that Harris himself could not recover on it and complainants, not being innocent holders, stand in the same plight that Harris would occupy.

At one time this defense would have been good. We think it is not available, however since the passage of the Negotiable Instruments Law. Chapter 94 of the Acts of 1899.

Section 25 of that statute is in these words:

"Value is any consideration sufficient to support a simple contract. An antecedent or preexisting debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time."

Section 27 is in the following language:

"Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien."

Under the sections above quoted a preexisting debt is value, even though the instrument is transferred merely as collateral security for such debt. *Birket v. Elward*, 68 Kan., 295, 74 Pac., 1100, 64 L. R. A., 568, 104 Am. St. Rep., 405, 1 Ann. Cas., 272; *Exchange National Bank v. Coe*, 94 Ark., 387, 127 S. W., 453, 31 L. R. A. (N. S.), 287, 21 Ann. Cas., 934; *German-American Bank v. Wright*, 85 Wash., 460, 148 Pac., 769, Ann. Cas., 1917D, 381.

The foregoing cases are all annotated, as reported in the Annotated Cases above cited, where many other like decisions are collected. There appears to be little or no conflict in the authorities in jurisdictions where Ne-

Crane & Co. v. Hall.

gotiable Instruments Law prevails, except that there is some uncertainty in the decisions of the intermediate appellate courts in New York. The New York Court of Appeals has not passed on the matter so far as we are advised.

This Hall note came into the hands of the complainants prior to its maturity, and there is no suggestion that complainants had any knowledge of any infirmity therein or defense thereto. We are therefore of opinion that complainants are innocent holders of this note in due course, even though it was taken as security for a pre-existing debt.

It is insisted that said note was taken as security for a worthless debt, and it is accordingly urged that the complainants are not for this reason holders for value in due course. For this proposition we are referred to *Trust Co. v. McDougald*, 132 Tenn., 323, 178 S. W., 432, L. R. A., 1917C, 840.

The proof does not justify the contention that the complainants' claim against Cockrill was worthless. The principle stated in *Trust Co. v. McDougald* is only to be applied in like cases. Among other peculiarities, that case was one of miserable fraud, to which the holder of the note sued on was a party. As stated before, the complainants here were entirely without notice of any wrongdoing on the part of Cockrill or Harris, from whom the Hall note was taken.

It is also contended for defendants that, if complainants be innocent holders of the Hall note and entitled to judgment thereupon, nevertheless they are not entitled to have set aside the conveyance from Hall to his wife.

Crane & Co. v. Hall.

The land transferred by Hall to his wife was inherited by the former a few months before this suit was brought from his mother's estate. Very shortly after complainants foreclosed the trust deed given to secure the Hall note, which they held as collateral, leaving a large balance still due on said note, Hall made a deed of the property so inherited from his mother to his wife for a recited consideration of \$5 and love and affection.

This deed is, of course, *prima-facie* fraudulent as against Hall's creditors. In the answer filed by Hall and wife to complainants' bill they insisted that he was indebted to her in a sum exceeding \$1,500, the value of the inherited property, and that said deed was made as a matter of fact by Hall to reimburse his wife for loans to him, which he had contracted to repay.

Hall and wife testified at length as to these loans and as to the alleged agreement to repay on the part of Hall, and that the nominal consideration mentioned in the deed was so recited by error of the draftsman.

The chancellor excluded this testimony and in so doing was right.

Section 5596 of Thompson's Code is as follows:

"In all civil actions in the courts of this State, no person shall be incompetent to testify because he or she is a party to, or interested in, the issue tried, or because of the disabilities of coverture, but all persons, including husband and wife, shall be competent witnesses, though neither husband nor wife shall testify as to any matter that occurred between them by virtue of or in consequence of the marital relation. (1869-70, chapter 78, section 1; 1879, chapter 200, section 1.)"

Crane & Co. v. Hall.

The advances to the husband and his alleged agreement to repay the wife was a "matter that occurred between them by virtue of, or in consequence of, the marital relation," and consequently a matter concerning which neither could testify.

This court has declared "that all transactions and conversations had between the husband and wife in relation to their own affairs, not in the presence of some third person, fall within the prohibition of the statute" and their testimony concerning such things must be excluded. *Insurance Co. v. Shoemaker*, 95 Tenn., 72, 82, 31 S. W., 270, and cases cited.

Even in cases where the testimony of the husband and wife as to such matters has been admitted without objection, it has been held insufficient to set up a contract between them to the prejudice of the husband's creditors, unless corroborated. *Insurance Co. v. Shoemaker*, supra; *Gates v. Card*, 93 Tenn., 334, 24 S. W., 486; *Tardison v. Bilington*, 82 Tenn. (14 Lea), 346; *Grotenkemper v. Carver*, 77 Tenn. (9 Lea), 280; *Page v. Gilleentine*, 74 Tenn. (6 Lea), 240; *Hyden v. Hyden*, 65 Tenn. (6 Baxt.), 406.

This is no real corroboration of the testimony of defendants Hall and wife in this record. There is only some proof from the notary who prepared the deed that they told him it was made in settlement of indebtedness owing by Hall to his wife.

Chapter 161 of the Acts of 1915, making husband and wife competent witnesses for or against each other, relates only to criminal cases, and even in those cases they may not testify as to their dealings and conversa-

Crane & Co. v. Hall.

tions had apart from others. *McCormick v. State*, 135 Tenn., 218, 186 S. W., 95 L. R. A., 1916F, 382.

It has been suggested that chapter 26 of the Acts of 1913, the so-called Married Woman's Emancipation Act, is effective to change the rule of evidence under discussion.

We do not think so. The act of 1913, according to its title, was intended to remove the married woman's disabilities incident to coverture; that is to say, the especial disabilities of the wife.

If the prohibition against the husband and wife testifying as to their private transactions be regarded as a disability, still it is not a disability of the wife, properly speaking, but a joint disability, resting upon both husband and wife.

The act of 1913 was designed to remove only such disabilities as were peculiar to a married woman. It did not purport to enlarge the husband's rights, or to reach disabilities common to husband and wife, and to give the statute such a construction would unduly extend its scope.

The foregoing observations render a detailed discussion of the assignments of error unnecessary, and the decree of the chancellor is affirmed.

Battistelli v. State.

LEON BATTISTELLI *v.* THE STATE.

(*Jackson*, April Term, 1919.)

1. PARDON. "After conviction."

Pardon after verdict, but before motion for new trial was overruled, came "after conviction" within Const. article 3, section 6. (*Post*, pp. 566, 567.)

Cases cited and approved: State ex rel. v. Garrett, 135 Tenn., 617.

Constitution cited and construed: Const. art. 3, sec. 6.

2. PARDON. Conditions. Binding effect.

Pardon having been issued upon express condition that defendant pay all costs of the case, defendant, who accepted the benefits of the pardon, must be held to have assumed payment of costs. (*Post*, p. 567.)

FROM SHELBY.

Appeal from the Criminal Court of Shelby County.
—Hon. T. W. HARSH, Judge.

RALPH DAVIS, for appellant.

W.M. H. SWIGGART, JR., Assistant Attorney-General,
for the State.

MR. JUSTICE GREEN delivered the opinion of the Court.
The defendant was found guilty of receiving stolen goods, and his punishment fixed at ninety days by verdict of the jury.

Battistelli v. State.

The verdict was returned November 27, 1918. A motion for a new trial was heard December 7, 1918, taken under advisement by the court and overruled January 10, 1919. In the order overruling the motion for a new trial sentence was suspended to permit the defendant to make application to the Governor for pardon. It turned out that the defendant had already applied for a pardon, and a pardon had been issued to him, relieving him of the imprisonment on January 9, 1919, the day before the motion for a new trial was overruled. On January 27, 1919, another order was entered in this case below, referring to the Governor's pardon and setting aside the former sentence of imprisonment, but adjudging that defendant be required to pay the costs of the case.

The defendant has attempted to prosecute an appeal in error from the proceedings below, for vindication, as his counsel says, and seeking to escape the payment of the costs.

Although the pardon in this case was actually issued before the motion for a new trial was overruled, still the pardon came after the verdict of the jury, and therefore came after conviction within the meaning of article 3, section 6, of the Constitution. *State ex rel. v. Garret*, 135 Tenn., 617, 188 S. W., 58, L. R. A., 1917B, 567.

After reciting the reasons that induced him to exercise clemency, in the pardon herein issued, the Governor says:

"I feel constrained to relieve defendant of the ninety-day workhouse sentence, upon condition that he pay all costs, including State and county tax and attorney-general's fees, and the further condition that he will in the

Battistelli v. State.

future refrain from all violations of the law, and that he will in all respects demean himself as a law-abiding citizen."

It thus appears that the pardon from the workhouse sentence was issued upon the express condition that defendant pay all the costs of this case.

As stated in *State ex rel. v. Garret*, supra, it is within the power of a convicted person to accept or decline a pardon as he chooses. Defendant's counsel was asked, upon the hearing of the case in this court, if he was willing to waive the pardon. Counsel replied that he did not feel authorized to do so.

We, therefore, have a case in which the defendant wishes to accept a pardon granted upon condition and at the same time seeks to escape the condition imposed.

This is not permissible. Defendant can avail himself of his pardon or he can repudiate it. He cannot, however, obtain the benefit of the pardon without complying with the condition upon which it issued. This court cannot determine controversies of such nature.

Having accepted the benefit of the pardon, the defendant must be held to have assumed the payment of costs herein, as he was required by the pardon to do.

It results that this appeal in error is dismissed, at defendant's cost.

Ivy v. Binswanger & Co.

J. W. Ivy v. BINSWANGER & Co.

(Jackson, April Term, 1919.)

1. PARTNERSHIP. Agreement. Record insufficient to establish.

In an action on rent notes under a lease which had been assigned to a corporation organized by lessees, defended on the ground that the corporation had assumed liability and defendants were released under the lease terms, evidence held not to show that lessees had agreed upon a partnership. (*Post*, pp. 574-577.)

2. CORPORATIONS. Lease to corporate promoter. Provision releasing from liability. Evidence.

Where a lease to corporate promoters provided that they were not to be personally liable for rent accruing after the thirty-sixth installment was paid, provided the corporation was organized and became lessee, and \$20,000 in cash was paid into its treasury, lessor's contention that such sum had not been paid in, held contrary to the evidence. (*Post*, pp. 577, 578.)

3. CORPORATIONS. Contracts between promoters and third persons. Payment for corporate stock. Furnishing machinery.

Where a contract by promoters with third persons required the payment of a certain amount of cash into the treasury of a corporation being organized, payment for stock by purchase of machinery held sufficient, the formality paying the money for the machinery and repaying it into the treasury being useless. (*Post*, pp. 578-582.)

Cases cited and approved: Kelly Bros. v. Fletcher, 94 Tenn., 6; Bristol Trust Co. v. Jonesboro Trust Co., 101 Tenn., 554; Morgan Bros. v. Coal & Iron Co., 134 Tenn., 244.

Cases cited and distinguished: Mills v. Faris, 59 Tenn., 457; Nunnelly v. Warner Iron Co., 94 Tenn., 282; Searight v. Payne, 74 Tenn., 285.

Ivy v. Binswanger & Co.

FROM SHELBY.

Error to the Circuit Court of Shelby County. Hon. H. W. LAUGHLIN, Judge.

FANT & FANT, for plaintiff in error.

M. E. LESSER for defendant in error.

MR. JUSTICE MCKINNEY delivered the opinion of the Court.

This suit was instituted by Binswanger & Co. against J. W. Ivy to recover on the last ten of a series of fifty-four notes executed to it by the said J. W. Ivy and one R. D. Harris on August 10, 1912; each of said notes being for \$160, and due, respectively, on the 1st day of each month, beginning April 1, 1913.

Said notes were lease notes for the rent of the building which Binswanger & Co. was to erect and turn over to the said lessees on October 15, 1912.

Ivy defended on the ground that, under the terms of the lease, more than thirty-six of the notes having been paid, he was released and not bound for their payment.

There was a judgment below for the balance due on said notes, which was affirmed by the court of civil appeals. Harris was not sued.

It seems that Harris and Ivy desired to organize and operate a corporation in the city of Memphis for the purpose of manufacturing candy. Binswanger & Co.

Ivy v. Binswanger & Co.

owned a vacant lot in Memphis which adjoined its place of business, and on August 10, 1912, it entered into a written agreement with the said Harris and Ivy, by which it contracted to construct a building on said lot for the said Harris and Ivy, or for the corporation to be organized by them. So much of the contract as pertains to the issues involved in this suit is as follows:

"This agreement made and entered into by and between Binswanger & Co., Inc., a corporation chartered under the laws of the State of Virginia, whose charter is regularly and duly filed for record in the office of the Secretary of State for the State of Tennessee, and which is lawfully authorized to do business in the State of Tennessee, having an office at the city of Memphis, Tenn., party of the first part, and R. D. Harris and J. W. Ivy, both of the city of Memphis, county of Shelby, and State of Tennessee, parties of the second part, witnesseth:

"That the said party of the first part has this day demised and leased, and by these presents does hereby demise and lease, unto the said parties of the second part, a certain three-story brick and concrete building to be erected on a lot of land fronting thirty-six feet on the south side of Union avenue, extending southwardly between parallel lines to the right of way of the Southern Railway Company, and which said lot is located between the right of way of the Southern Railway Company on the west and Myrtle street on the east, and lies immediately west of and adjoining the three-story brick building No. 645-655 Union avenue, in Memphis, Shelby county, Tenn., which said building is to be erected according to plans and specifications submit-

Ivy v. Binswanger & Co.

ted by the party of the first part to the parties of the second part, and which have been accepted and approved and identified by the signatures of the parties hereto.

"To have and to hold the said premises for the term beginning on the 15th day of October, 1912, and ending on the 31st day of August, 1917, inclusive; the parties of the second part yielding and paying therefor a gross rental of \$9,360, payable in monthly installments, whereof the first five installments, amounting to \$800, have been paid in cash by the parties of the second part to the party of the first part, the receipt whereof is hereby acknowledged, and the remaining \$8,560 is evidenced by fifty-four promissory notes, of even date herewith, one whereof is for the sum of \$80, payable on the 15th day of March, 1913, and the remaining fifty-three are for the sum of \$160 each, the first payable on the 1st day of April, 1913, and the remaining fifty-two successively on the 1st day of the next succeeding fifty-two months of said term; all of which said notes are executed and delivered by the parties of the second part, said rent reserved herein being payable in advance, at the office of the party of the first part.

"This demise and lease is upon the condition that the said premises herein demised and leased shall be used solely for the manufacture of, handling, and dealing in candy, soda, charged and mineral waters, cakes, crackers, dried fruits, syrups, and confections, and other goods similar thereto, and for no other purpose. But this clause shall not apply in case this lease shall be transferred to other parties with the consent of the first party as hereinafter contracted for.

"The said parties of the second part contemplate

Ivy v. Binswanger & Co.

the organization of a corporation to carry on in the herein demised premises the business hereinbefore authorized.

"The party of the first part does covenant and agree that if at any time the parties of the second part shall form, organize, and incorporate a corporation under the laws of the State of Tennessee, in compliance with the statutes of said State in that behalf enacted, a corporation with an authorized capital of not less than \$50,000, whereof at least \$20,000 shall be paid in cash into said company, said parties of the second part shall have the right to assign and transfer the within lease to said corporation, and the party of the first part will accept said corporation as its tenant in said premises upon the same terms, provisions, agreements, covenants, conditions, and limitations as herein set forth, and as if named herein as one of the lessees, without, however, in any wise releasing or discharging said parties of the second part from their liability on the first thirty-six installments of said rent.

"The said parties of the second part further covenant and agree that in the event said corporation is organized and is accepted under the terms hereof as the tenant of the party of the first part, that they will remain bound upon their said obligation notwithstanding there shall be any departure from the within lease by reason of any agreement between the party of the first part and said corporation.

"The party of the first part covenants and agrees that if said corporation shall be organized as aforesaid, and accepted as tenant in accord with the provisions hereof, that it will release the parties of the

Ivy v. Binswanger & Co.

second part from any individual liability on any and all installments of rent accruing after the thirty-sixth installment is paid."

This building was completed and turned over to the lessees some time in November, 1912, and Mr. Ivy testifies that—

"Immediately upon opening our doors an application for a charter was made, and our business was always conducted as the Harris-Ivy Candy Company. For some reason the granting of the charter was delayed. We didn't wait until the charter arrived to begin business. We thought that we were entitled to do business in our corporation name as though we were authorized by the State. Every rent check after the \$800 had been advanced was paid by the Harris-Ivy Candy Company."

Upon being asked as to when they began doing business this witness says:

"Why some time in December we manufactured some goods to try out the machinery more than anything else. We had no salesmen, offered no goods for sale, and solicited no business until possibly right at Christmas, when we offered some goods that we had made at that time, but we had applied for the charter."

The charter in fact became effective on February 1, 1913, and the charter name of the corporation was the "Harris-Ivy Candy Company," the name by which the company was operated from the day it opened its doors until it ceased to do business in 1916.

It appears that shortly after the lease contract was executed the lessees began to make contracts for their

Ivy v. Binswanger & Co.

machinery, so as to have it ready for installation upon the completion of the building.

A good deal has been said as to a partnership, composed of Harris and Ivy, doing business under the firm style of the Harris-Ivy Candy Company, prior to the obtaining of the charter of incorporation. There is nothing in the record to sustain such a charge. In fact, no such partnership was contemplated or agreed upon, or in fact ever existed. It was intended from the beginning that this enterprise should be a corporation, and it was so treated by all of the parties, and they undertook to operate it as such from the beginning. It is true that they carried on the business for a month or two prior to the date that the charter was actually issued, and, no doubt, the individuals would have been liable as such for any obligations incurred during that period, but they would not have been liable as partners, for the reason that there was no partnership in existence.

In 30 Cyc. 349, the author says: "The definition of a partnership which seems to be most accurate and comprehensive is that of Chancellor Kent, as follows: 'A contract of two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions.'"

Binswanger & Co. insist that they were never notified of the incorporation of the company and of the transfer of the lease by Harris and Ivy to the corporation. The proof shows conclusively that the lease was transferred to the corporation.

Ivy v. Binswanger & Co.

Mr. Binswanger, on his cross-examination was asked the following question:

"Q. You knew that Harris-Ivy Candy Company was incorporated under the laws of Tennessee on or about the 1st day of February, 1913, did you not?

"A. I had no definite knowledge. I presumed that they did."

On this question Mr. Ivy testifies as follows:

"Q. Do you know of your own knowledge of any notice, either verbal or written that was ever given by you or Mr. Harris, or the Harris-Ivy Candy Company, advising Binswanger & Co. that you had assigned the lease to the Harris-Ivy Candy Company?

"A. No more than Mr. Binswanger was notified that there was \$25,000 of stock paid into the concern. That was not a business notice, but an informal discussion in which we were stating our condition to him—talking in the office. That we had \$25,000 paid-up capital. That was after the incorporation of the company. We were in the building operating. Mr. Binswanger was making a call in our office, and we were discussing the affairs at that time."

This business of the candy company was conducted next door to Binswanger & Co., and it appears from the proof that Mr. Binswanger frequently came to the candy plant, inspected same, discussed its business affairs with its officers, and its rents were paid in every instance, excluding the advance payment of \$800, by the checks of the corporation.

On this question the court of civil appeals in its opinion says:

Ivy v. Binswanger & Co.

"There is no direct evidence in this case that Binswanger & Co. were ever notified of the organization of this corporation, and Binswanger himself swears that he was not. The fact that he received the checks of the corporation, under ordinary conditions, would be conclusive proof of that question, but in this particular case it is made to appear that the checks issued subsequently to the incorporation were signed exactly as they were before its organization, so that that cannot be taken as constituting notice. In the absence of notice and in the absence of knowledge on his part, of course, payment in this way would not constitute, in the opinion of the court, payment by the corporation, and would not operate as an estoppel against Binswanger."

Mr. Binswanger does not deny any of the testimony of Mr. Ivy on this question. Taking this record as a whole, we think the evidence is ample to justify the court in holding that Binswanger & Co. had knowledge that this was a corporation and that the rent was paid with the checks of the corporation.

We find nothing, however, in the contract providing that any formal notice shall be given to Binswanger & Co. of the incorporation of the company. We do not think there is anything whatever in this contention.

The error committed by the court of civil appeals was in holding that checks had been issued prior to the incorporation signed "Harris-Ivy Candy Company." We find no such evidence in the record, and certainly no such checks were ever given to Binswanger & Co. The fact is that, five months of the rent having been paid in advance, none of said rent notes became due until April

Ivy v. Binswanger & Co.

1, 1913, which was two months after the company was incorporated

When the \$800 was paid in August, 1912, Harris and Ivy each executed their individual check for \$400, and, so far as this record shows, Binswanger & Co. never received a check signed "Harris-Ivy Candy Company" until after the incorporation of the Company.

It is next insisted that the \$20,000 in cash provided for in the contract was never paid into the treasury of the corporation.

We do not think this contention is well made, so far as the rights of the parties to this suit are concerned. As the machinery for the company began to arrive, Mr. Ivy advanced the money out of his individual funds to pay for same. Including the \$400 advanced on account of rent, he had advanced for the company, at the time the charter was issued, \$10,300, and the company issued to him stock for this amount. As to this item the defendant in error does not make any special complaint, and none could have been successfully made. It would have been a useless formality for Ivy to have executed to the company his check for \$10,300 in payment of his stock, and for the company at the same time to have executed to Ivy its check for a like amount on account of advances made by him for the company.

A man by the name of Partee also became a stockholder in the company, subscribing for fifty shares of its stock, for which he paid to the company \$5,000 in cash.

Mr. Harris advanced \$400 on account of rent, paid to the company \$3,100 in cash, and furnished it ma-

Ivy v. Binswanger & Co.

chinery or advanced for it on account of machinery purchased for it, \$6,500, making a total of \$10,000, and stock was issued to him in that amount.

Excluding the \$6,500 item, the amount of cash paid to the company by these stockholders amounted to \$18,800 and with the \$6,500 added the amount totalled \$25,300, for which stock was issued to the respective parties in February, 1913. And, as thus organized, the corporation carried on its business until 1916, when the company became a bankrupt. So there can be no question as to the good faith of these transactions, and no such question is made.

Mr. Harris, it appears from the record, is a resident of Detroit, Mich., and did not testify in this case.

As to the item of \$6,500 for machinery, it seems that the American Confectionery Company of Nashville had had a fire. It had a lot of machinery for making candy, most of which was new and had never been used. It was unable to adjust its loss with the insurance company, and so it sold this machinery to Mr. Harris. As to whether Harris bought this for himself or for the company the proof does not show. Neither does the proof show whether Mr. Harris made any profit out of the transaction, but the uncontroverted proof was that the machinery was well worth \$6,500, and that this purchase was agreed to by the company. The company necessarily had to have machinery to carry on its business. If Mr. Harris had paid the \$6,500 in cash to the company for his stock, and the company had immediately paid him back the \$6,500 for the machinery, the provision of the contract in question would have been literally complied with. We do not

Ivy v. Binswanger & Co.

think such a formality had to be gone through with. We think the spirit of the contract was fully complied with.

Evidently the object which Binswanger & Co. had in having this provision incorporated in the contract was to guarantee the good faith of the transaction, and to guarantee the strength, stability, and effectiveness of the company. In other words, if these parties were willing to invest \$20,000 of their funds in the venture and were willing, in addition, to insure the payment of the first thirty-six notes, Binswanger & Co. were willing to look to the corporation for the payment of the remaining eighteen notes.

The objections interposed by the defendant in error are entirely too technical. Suppose, for example, that the parties, in order to comply with this provision of the contract, had actually paid into the treasury of the new corporation \$20,000 in cash, and that thereupon the company had paid this \$20,000 back to these same parties for a lot of old machinery that was not worth more than \$5,000. While this would be a literal compliance with the letter of the contract, it would be absolutely violative of the spirit of the contract, and we do not think, under such a state of facts, that the parties could successfully resist payment of the remaining notes after the first thirty-six had been paid. And in this instance the present defendant in error would not be insisting, as it is now doing, upon a literal compliance with the contract.

"It is a well-settled rule in this State that the governing principle of construction is the intention of the parties, and that this intention may be ascertained by looking to the situation of the parties, the motive which

Ivy v. Binswanger & Co.

induced the agreement, and the objects and purposes designed to be effected by it; the sole object of the court being to do justice between the parties by enforcing a performance of their agreement according to the sense in which they mutually understood it at the time it was made." *Mills v. Faris*, 12 Heisk., 457.

"In ascertaining the intention, the situation of the parties, the motives that led to the agreement, and the objects designed to be effected by it may all be looked to by the court." *Nunnally v. Warner Iron Co.*, 94 Tenn., 282, 29 S. W., 124.

In *Searight v. Payne*, 6 Lea, 285, where the complainant, instead of paying for his subscription in cash, paid for it with other property, the court approved of this method of paying for his stock and said:

"To go through the mere form of paying in the money, and immediately paying it out for the property, would not in any way facilitate the business, or aid the after creditors of the firm, nor furnish them any additional security for their debts."

"It is quite as well settled that the subscriber may pay and satisfy his stock subscription either in money or in such property as the corporation may need, and agree to take, in good faith and at a fair valuation; and, if the property is taken at a fair valuation and in good faith, the payment is as effectual and as valid as though made in cash to the same amount" *Kelley Bros. v. Fletcher*, 94 Tenn., 6, 28 S. W., 1100; *Bristol Trust Co. v. Jonesboro Trust Co.*, 101 Tenn., 554, 48 S. W., 228; *Morgan Bros. v. Coal & Iron Co.*, 134 Tenn., 244, 183 S. W., 1019, Ann. Cas., 1917E, 42.

Ivy v. Binswanger & Co.

"Even where the charter, statute, or other governing instrument, by its terms, requires payment in money, yet unless the language is such as to import a prohibition of anything but money, the courts are generally agreed that payment may be made in any kind of property or services which the corporation may lawfully purchase in the prosecution of its business, provided it be done in good faith, and provided such property or services be conveyed or rendered at a fair valuation. The reason is that the law does not require the parties to go through the vain transaction which would be exhibited if the subscriber should pay for his shares in cash, and if the corporation should hand back the cash in purchasing from the subscriber such property as the corporation might wish to buy from him; or what would be the equivalent of such a transaction, that there should be a mere exchange of checks between the parties." 10 Cyc., 472.

"Under the old common-law rule, a strict performance is usually required as a condition precedent to recovery; but the modern rule is more liberal, and it may now be stated as a general rule that a substantial performance in all respects in good faith is sufficient to satisfy the law." Elliott on Contracts, Section 1878.

"As a general rule, a slight difference between the performance and the specification, or a very technical breach which causes no damages, and where the result is the same and fully as good as if there had been a literal compliance, cannot be taken advantage of as inconsistent with or failing to constitute substantial performance." Elliott on Contracts, Section 1879.

Ivy v. Binswanger & Co.

As to the authorities relied upon by the defendant in error, we do not deem it necessary to discuss them in detail, as we do not consider them in point or inconsistent with our holding herein.

We are of the opinion that the merits of this case are with the plaintiff in error. It results, therefore, that the judgment of the court of civil appeals and of the lower court will be reversed, the suit will be dismissed, and the defendant in error will be taxed with all the costs.

Watkins v. U. S. Casualty Co.

HENRY C. WATKINS *v.* UNITED STATES CASUALTY CO.*
SAME *v.* METROPOLITAN CASUALTY CO.

(Jackson, April Term, 1919.)

1. INSURANCE. Accident insurance. Notice of injury. Knowledge of disability.

Where two accident insurance policies provided that "written notice of an injury or of the beginning of any disability" must be given within forty days, and "within twenty-one days from the date of the accident or injury," respectively, an insured, who lost an eye by accident, but did not know the extent of the injury until forty-one days after the accident, complied with the terms of the policies, where he gave notice within forty and twenty-one days, respectively, from the time he acquired such knowledge. (*Post*, pp. 600, 601.)

Case cited and approved: *Hughes v. Central Accident Ins. Co.*, 222 Pa., 462.

Cases cited and distinguished: *Grant v. North American Casualty Co.*, 88 Minn., 397; *Hoffman v. Provident Indemnity Company*, 56 Mo. App., 301; *Baumister v. Casualty Co.*, 124 Mo. App., 38; *U. S. Casualty Co. v. Hanson*, 20 Colo. App., 393; *Odd Fellows Fraternal Accident Association v. Earl*, 70 Fed., 16; *Borick v. Railway Officials' & Employees' Accident Association*, 119 Fed., 63; *Jennings v. Brotherhood Accident Co.*, 44 Colo., 68; *Peele v. Provident Fund Society et al.*, 147 Ind., 543; *People's Accident Association v. Smith*, 126 Pa., 317.

2. INSURANCE. Accident insurance. Construction of policies.

Provisions in accident insurance policies relative to the time within which notice of loss or injury must be made must be construed

*Authorities passing on the question as to nondevelopment of injury as affecting time of giving notice required by an accident insurance policy are collated in a note in 14 L. R. A. (N. S.), 503.

As to when strict compliance with requirement as to time of notice in accident or health policy is excused, see notes in 18 L. R. A. (N. S.), 109; 27 L. R. A. (N. S.), 319.

Watkins v. U. S. Casualty Co.

according to the intention of the parties and against the insurer, where such construction does not violate the plain provisions of the contract. (*Post*, pp. 601-603.)

Cases cited and approved: *Hatch v. U. S. Casualty Co.*, 197 Mass., 101.

3. INSURANCE. Accident insurance. Payment of premiums. Evidence.
In an action on an accident insurance policy, a claim by the insurer that premiums had not been paid could not be sustained, where it appeared that the insurer's local agent had extended credit to insured, paid the premium for him, and charged it to him. (*Post*, pp. 603, 604.)

4. INSURANCE. Accident insurance. "Loss of entire sight."
Under an accident insurance policy, there was "loss of the entire sight of one eye," where insured's eye became incurably sightless and useless, although a slight light perception still remained. (*Post*, p. 604.)

5. INSURANCE. Accident insurance. Notice of other insurance. Waiver.

In an action on an accident insurance policy, where the defense was interposed that insurer was only liable for a proportionate part of the loss because of insured's failure to give it notice that other insurance had been taken out, such notice held waived by failure to cancel the policy and collection of premiums after knowledge of the other insurance. (*Post*, pp. 604-606.)

Case cited and approved: *Westchester Fire Ins. Co. v. McAdoo*, 57 S. W., 409.

FROM SHELBY.

Appeal from the Chancery Court of Shelby County.—
HON. L. H. PERES, Chancellor..

G. J. MCSPADDEN, for plaintiff.

Watkins v. U. S. Casualty Co.

WILSON & ARMSTRONG, for U. S. Casualty Co.

BROWN & ANDERSON, for Metropolitan Casualty Co.

MR. JUSTICE MCKINNEY delivered the opinion of the Court.

These suits were instituted by the complainant, Dr. Henry C. Watkins, against the defendant Casualty Companies to recover on two accident policies issued to him by the respective defendant companies for the loss of an eye.

The evidence in the two cases is identical. The cases were heard together, and we will dispose of both cases in this opinion.

On May 24, 1914, the United States Casualty Company issued a life and accident policy to the complainant in the principal sum of \$7,500. Among other losses insured against the policy insured Dr. Watkins against the loss of the entire sight of one eye, irrecoverably, in the sum of \$3,750.

The policy was issued for one year; was renewed each succeeding year, and was in force at the time of the accident resulting in the loss of his left eye. The policy contained the following provision:

"Written notice of an injury or of the beginning of any disability from sickness must be given by the insured or the beneficiary within forty days, to the company at its home office in New York City, or to a duly authorized agent of the company in the town, city or county in which the insured shall reside at the time of the giving of such notice, unless such notice shall be shown not to have been reasonably possible, in which

Watkins v. U. S. Casualty Co.

event such notice must be given as soon as may become reasonably possible. When claim is made for loss resulting from injury, proof of loss, under oath, must be furnished to the company at its home office in New York City within ninety days from the date of loss of life, or sight, or limb, or hand, or foot, and within ninety days from the date of the termination of loss of time or other disability, as defined herein."

In May, 1913, the defendant, Metropolitan Casualty Insurance Company, issued to Dr. Watkins its policy, by which it agreed to pay \$9,000 in case of death and \$4,500 for the loss of one eye. This policy was renewed from year to year, and was in force when the injury complained of was received.

This policy contained the following clause:

"Clause 12. Written notice must be given the company at its home office in New York City, or to any of its duly authorized agents, of any accident or injury for which a claim is to be made, with full particulars thereof and the full name and address of the insured, within twenty-one days from the date of the accident or injury, unless the giving of such notice within such time shall not be reasonably possible, in which event such notice must be so given as soon as reasonably possible."

On January 17, 1917, Dr. Watkins entered his home and observed his wife standing with her back to him. He slipped up behind her and punched her in the ribs. It startled her, and she threw up her hand hitting him in the left eye, or rather, the doctor had on rimless glasses, and she hit the glasses and drove them against his eye. The pain for something like half an hour was excruciating and he testified that from that

Watkins v. U. S. Casualty Co.

time on he knew that there was something the matter with his eye. However, he did not think it was anything serious, and thought the trouble would eventually pass away. He had no idea that he would lose his eye. His wife examined his eye at the time of the accident, and discovered nothing wrong, except that the eye was a little red.

Dr. Watkins is a practicing physician, and did not quit work at all on account of this accident; had no idea of making any claim for weekly indemnity, and in fact did not make any. His eye did not become normal as he thought it would, and he probably became apprehensive that there was something serious about the injury, though he did not think that he had lost his eye. So that, on February 27th, forty-one days after the accident, he had Dr. Lewis, an eye specialist, to examine his eye, and learned for the first time that he had lost his eye. On the same day he gave both defendant companies notice.

Dr. Lewis testified that the injury was caused by a hemorrhage of the retina, produced by an injury to the eye. That upon an examination of the interior of the eye he found a degenerative change in the retina; that by degenerative change was meant the death of the tissues; the loss of their functioning powers; the substance of the eyeball had deteriorated; that the injury was not complete just after the accident; that the degeneration was not complete possibly for days and weeks that all hemorrhages do not cause degenerative changes; that it may be absorbed and the eye not injured.

Watkins v. U. S. Casualty Co.

It does not appear therefore just how soon after the accident the degeneration took place, but it is manifest that Dr. Watkins did not know that he had lost his eye until February 27, 1917, and immediately upon ascertaining that he had sustained an injury that was covered by his policies he gave the companies notice.

Dr. Lewis examined this eye again on November 13, 1918, and saw no change, and says he will never recover sight in this eye.

The chancellor dismissed both bills on the idea that the provisions in the respective policies as to notice had not been complied with.

Notice was given forty-one days after the accident. The United States Casualty Company policy provided that: "Written notice of an injury must be given by the insured to the company or its agent within forty days, unless such notice shall be shown not to have been reasonably possible, in which event such notice must be given as soon as may become reasonably possible."

In this case the accident occurred on January 17th. The policy provided no indemnity for such an accident, and the complainant had no claim against the company until he lost his eye. We will assume, for the sake of argument, that the vision in this eye became extinct on February 17th, a month after the accident, and at which time the company became liable to the complainant.

Under these facts has the complainant forty days from January 17th, or forty days from February 17th within which to give the notice?

Watkins v. U. S. Casualty Co.

The Complainant had no claim against the defendant until February 17th. Can this policy be construed to mean that, whenever the insured happens to an accident that may possibly produce an injury at some future time that is covered by the policy, the insured has to give notice within the prescribed time from the date of the accident?

Take, for example the facts in the case of *Hughes v. Central Accident Ins. Co.*, 222 Pa., 462, 77 Atl., 923. On December 14, 1904, Hughes, while riding on a passenger train got a cinder in his eye. Several weeks afterwards he realized there was some impairment of his vision. He went to Dr. Zigler an eye specialist, and was advised that a cataract was forming on his eye as a result of the cinder accident, the result being that he lost his vision. The insurance company was given notice on January 27, 1905.

In this particular case the policy provided for immediate notice, which the courts construe to be within a reasonable time. But suppose in that case the policy had provided for notice within ten days, would the complainant be barred because he did not notify the company within ten days after the accident, when as a matter of fact the injury for which the company was liable did not result for many days thereafter?

Do such provisions as the one under consideration mean that when you get a cinder in your eye you must give notice on the theory that the loss of sight may subsequently result, or that when you are pricked by a pin, or cut yourself slightly with a razor when shaving, that you must give notice because it is possible that, as a result of such accident, you may subsequently have

Watkins v. U. S. Casualty Co.

blood poisoning? Or does such provision mean that when you receive an injury, that the policy provides compensation for you must give the prescribed notice from the date of such injury?

We think the following authorities answer these questions:

The case of *Grant v. North American Casualty Co.*, 88 Minn., 397, 93 N. W., 312, involved a sick benefit claim under the terms of the policy as well as a death claim. The policy provided that: "Notice must be given the company of any illness with full particulars thereof, for which claims would be made, within ten days from the beginning of the illness, and that a failure to give such notice would release the company from all liability."

The insured was taken ill about January 1, 1902, called a physician on the 4th, and was obliged to stop work on January 11th. On the 15th of that month the company received a notice of his illness. On March 7th the insured died. The supreme court of Minnesota held the notice to be sufficient; that the notice was to be given within ten days of the time on which the insured became totally incapacitated from work, and not from the date the illness began as the policy literally provided.

In the case of *Hoffman v. Provident Indemnity Company*, 56 Mo. App., 301, the policy provided that notice should be given within ten days of the happening of the accident, and that a failure to give the notice should invalidate all claims under the policy. In its opinion the Missouri Court of Appeals stated the facts as to the accident and notice as follows:

Watkins v. U. S. Casualty Co.

"It appears from the evidence that the insured, on the last day of December, 1891, slipped from a wagon which he had been driving, and in the fall his head came in violent contact with a wedge-shaped piece of wood, which inflicted a long and deep cut on it just above one of his eyes. His injuries, thus received were quite severe. He lived thereafter for forty days, when he died from inflammatory rheumatism, which, in the opinion of the medical experts, was caused by the injury he had received. Neither the insured nor his attending physician gave the defendant company any notice of the accident or injury. Eight days after the death of the insured, his father, at the request of the plaintiff wrote the defendant company notifying it that the insured 'had received injuries about his head about six weeks ago and had been sick and disabled ever since and died February 10.' The defendant company, within five days thereafter, in acknowledging the receipt of the notice to the father, informed him 'that the policies issued by this company provide that no claim shall be made unless proper notification of the happening of any injury for which claim is made is given to the secretary of this company, mailed within ten days of the happening of the accident.' Some nineteen days after the death of the insured, the plaintiff herself gave the defendant a notice which was a substantial compliance with the requirements of said condition."

The company defended the suit upon the ground that it had not received the notice within the time required by the policy.

The Missouri Court of Appeals held that it was impossible for the beneficiary to give the notice within

Watkins v. U. S. Casualty Co.

ten days after the accident, for the reason that the insured did not die until forty days thereafter. Until his death she had no claim under the policy, and could not give notice of an event that had not taken place. Neither could the insured nor his physician, give the required notice, for such notice from them would have been premature. It was not the accident, but the death, that the company had insured against. The court held that the notice was sufficient.

In *Baumister v. Casualty Co.*, 124 Mo. App., 38, 101 S. W., 152, the policy contained the following stated provision:

"A written notice of any accident on which a claim may be based, given by the insured, his legal representative or beneficiary, and received by the company in Chicago within fifteen days from the date of the accident, together with such further proofs as may be required by the company, are conditions precedent to a recovery hereunder."

The court stated the facts in regard to the injury as follows:

"During the life of the policy, on November 27, 1902, the plaintiff, while firing a locomotive engine, accidentally struck his left knee against the deck of the engine, whereby it was somewhat bruised and sprained. At the time of the accident plaintiff was in Missouri about twenty-five miles from Argentine, Kan., the end of his 'run.' He continued to fire his engine to Argentine, and when he got there his knee was stiff and swollen, and he consulted a surgeon, who applied a bandage. He thought his injury of little moment, and that he would be disabled for a few days only. With no inten-

Watkins v. U. S. Casualty Co.

tion of making any claim under his policy he quit his work and had his knee treated by the doctor. By the 5th of December he thought he had so far recovered as to be able to again go to work, and on December 5, 1902, he resumed the performance of his duties as a locomotive fireman. After working, his knee again began to give him trouble, and gradually grew worse until about the 3d of January, 1903, when he was again compelled to quit work. By that time the knee was badly swollen, sore, and stiff, and plaintiff was unable to walk. The evidence shows that from January 3, 1903, to the time of the trial he was wholly disabled, and that he is crippled for life."

Among other defenses, the company set up that of lack of notice within the time required by the policy. Upon that point the court said:

"What we have written practically determines the sufficiency of the notice. As already stated, the injury to plaintiff, for which defendant was to indemnify him, was loss of time. The loss of time for which he claims did not begin until more than the number of days after the accident which were limited for notice had expired. Defendant's contention that the notice must be given within fifteen days after the accident practically would nullify the policy in all those cases where loss of time did not begin until after time for notice had expired. The true meaning of the clause as to notice is that it must be given within fifteen days after the loss of time began, which was January 5, 1903. In this interpretation the notice was in time."

In *United States Casualty Co., v. Hanson*, 20 Colo. App., 393, 79 Pac., 176, it appeared that the insured, on

Watkins v. U. S. Casualty Co.

June 7, 1897, while supervising the construction af a mill, fell, and struck the base of his spine on a rock. At the time he thought his hurt a trivial matter, not worthy of being called to the attention of the insurance company. His lameness increased, and he suffered considerably. He thought he was suffering from rheumatism. From October, 1897, to February, 1898, he was being treated for rheumatism nearly all of the time. On February 4, 1898, he was examined by a Dr. Eskridge, who attributed his condition to the injury of June, 1897. Thereupon he gave notice to the insurance company. In a suit on the policy one of the defenses set up by the company was the failure to give the notice within the time required by the policy. On this point the court said:

“The policy provides that written notice shall be given appellant within ten days of the event causing the accident, with full particulars of such accident and injury for which claim is made.

“The accident in question occurred June 7, 1897, and the notice thereof was not given the company until February, 1898. It is said this is fatal to a recovery.

“The further facts are, appellee did not know, nor did the physicians and surgeons to whom he submitted himself for extended treatment, that the accident was the cause of his injuries until February 4, 1898, when the examination was made by Dr. Eskridge. Prior to that time, and even subsequently, physicians determined his condition to be due to rheumatism. There was no bad faith upon his part in failing to give the notice. Within the prescribed time after he knew that the accident was the cause of his injuries he notified appellant.

Watkins v. U. S. Casualty Co.

Within the authorities this was all that the policy reasonably required of him. This construction will not work a forfeiture, nor will it require an impossibility of appellee. Such a provision should receive a liberal and reasonable construction in favor of the beneficiaries under the policy."

In the case of *Odd Fellows Fraternal Accident Association v. Earl*, 70 Fed., 16, 18, 21, 16 C. C. A., 596, 597, 601, 34 U. S. App., 285, the question here raised came before the United States Circuit Court of Appeals for the Seventh Circuit. That court in vigorous language applied the doctrine we here invoke. The court stated the facts of the case as follows:

"On July 23, 1892, Dr. D. G. Earl a physician of Lake Mills, Jefferson county, Wis., became a certificate holder in said association. Defendant in error, Mrs. Fanny K. Earl, then the wife and now the widow of Dr. Earl, is named in the certificate as beneficiary, and said instrument contains a promise by the association to pay her a specified sum of money in case of her husband's death as the result of accident. On August 4, 1892, Dr. Earl accidentally stepped on a wire nail, receiving therefrom a puncture in his foot. The wound, though visible, was very slight. Dr. Earl kept on with his professional work, without any interruption whatever, for the fourteen days immediately following the accident. He then became sick; and, as the result of such accident, died of lockjaw on the 27th day of said month. Proofs of loss were tendered by Mrs. Earl in due time, but the association declined to pay, insisting that a notice to the association of the accident within ten days of the date thereof was a

Watkins v. U. S. Casualty Co.

condition precedent to liability, and that such notice had not been given. She sued on the certificate, and recovered judgment for \$5,495.90 in the circuit court of the United States for the Western District of Wisconsin, and the association brings the record to this court by writ of error."

The court affirmed the judgment against the association upon this point, among other things, saying:

"On the other hand, and in this connection, the scope of the insurance, the benefit proposed in this certificate, is to be considered, for said words may be treated as merely intensive or precautionary, rather than be brought into conflict with what is otherwise the plain sense and purpose of the contract, by attributing to them a meaning which they do not necessarily contain. An accident by a means which is external, violent, and fortuitous, and which produces external visible mark upon the body, may for a time utterly escape the attention, or even the knowledge, of the person affected, and yet result eventually in mutilation or death. In an accident of the kind which killed Dr. Earl, there may be, for a time, as in his case, nothing whatever to suggest the perils insured against, namely, mutilation or death, as possible results. Yet such accidents are within the scope of this policy. A requirement that notice of such an accident must be given within ten days of its occurrence would be rather a cancellation of the policy with respect to a risk distinctly specified therein, than a rule of procedure to be followed by the certificate holder, an extinguishment of the insurance, rather than a limitation upon the method of ascertaining the loss to be compensated. If such a requirement be not void for repugnancy, within the rule illustrated by *In re*

Watkins v. U. S. Casualty Co.

State Fire Ins. Co., 32 Law J. Ch., 300, it is so far unreasonable that we cannot put it into the contract by implication. We cannot imply from the words in question a significance which they do not express, when the effect would be to annul part of the insurance specified in the certificate as the subject-matter thereof."

The case of *Rorick v. Railway Officials' & Employes' Accident Association*, 119 Fed., 63, 55 C. C. A., 369, also involves the same question. That case was decided by the United States Circuit Court of Appeals for the Ninth Circuit in 1902, and is frequently cited. The first paragraph of the syllabus fairly sets forth the holding of the court upon this point. It is as follows:

"An accident policy, insuring only against 'physical bodily injury resulting in disability or death,' contained a provision that 'notice of the accident causing the disability or death shall be given in writing . . . within fifteen days from the date of the accident causing the disability or death, . . . and failure to give such notice within said time shall render void all claims under this policy.' Held, that under such policy the time for giving notice did not commence to run until either disability or death resulted from an injury, until which time there was no 'accident causing disability or death,' which brought the case, within its terms, and that where an insured received a blow on the head which did not cause disability at the time, and was regarded as a trivial injury, but which resulted a few days later in both disability and death, a notice given four days after his death and within ten days after his disability was in time."

Watkins v. U. S. Casualty Co.

The insured was injured at some time between the 11th and 14th days of March, 1900. He died on March 26, 1900. The company was not notified until four days after his death. Hence the notice was not within fifteen days of the accident, as the policy required. But the United States Circuit Court of Appeals held the notice to be sufficient.

In *Jennings v. Brotherhood Accident Co.*, 44 Colo. 68, 96 Pac., 982, 18 L. R. A., (N. S.), 109, 130 Am. St. Rep., 109, a sick benefit, alleged to be due under an insurance policy, was sued for. The policy provided for ten days' notice. About December 20th the insured became sick and quit work. In two or three days he went back to work. About January 1st he again got sick and sent for a doctor. Both the doctor and the insured thought the illness to be trivial, and gave no notice to the company. Both supposed the insured had a cold and that a few days' rest would restore his health. But as time went by the insured got no better, and about January 20th, the doctor came to the conclusion that his diagnosis was wrong, and saw that his patient was really ill. On January 21st the notice was sent to the company, informing it of the insured's disability, and giving notice of his claim for a sick benefit under the policy. The notice gave the beginning of the disability as January 1st. The company refused to pay the amount claimed upon the ground that the notice had not been given as the policy required. The Supreme Court of Colorado held, in that case, that while the notice had not been given within the ten days fixed by the policy, it had been given as soon as the insured learned of the real nature of his illness and for that

Watkins v. U. S. Casualty Co.

reason was in time; that the policy should not be so construed as to mean that the holder was required to give notice of his disability before he himself became aware of it.

In *Peele v. Provident Fund Society et al.*, 147 Ind., 543, 44 N. E., 661, 46 N. E., 990, the policy contained the following quoted provisions:

"Notice of any accidental injury for which claim is to be made under this certificate shall be given in writing, addressed to the president of the society at New York, with full particulars of the accident and injury, and failure to give such written notice within ten days from the date of either injury or death shall invalidate any and all claims under this certificate."

On the 17th of December, 1894, at his home near Terre Haute, the insured went into his bathroom to take a bath in a large porcelain bathtub. He requested his wife the beneficiary, to assist him after his bath was completed. She waited a sufficient length of time and went to the bathroom for that purpose. She found him lying in the water, and supposed him to be dead. Her outcries brought others to her assistance, and some of the attendants thought they observed some feeble signs of life for an hour or more, after which there was no question as to his death. The insured's wife, the beneficiary, was prostrated by grief and shock. A coroner was sent for and made an investigation. The wife went to the burial in the city of Indianapolis and was unable by reason of her physical condition to return home or transact any business until December 24th. She did not learn of the coroner's report, nor of the fact that her husband's death was caused by ac-

Watkins v. U. S. Casualty Co.

cidental drowning, until December 28th. She gave notice of the accident and of the insured's death on the following January 2d. That was not within the ten days after the accident, as required by the policy, but was within ten days of the time when she learned that the death of the insured was caused by an accident. It was shown that an agent of the society saw an account of the insured's death in the newspapers, and thus acquired actual knowledge of the fact.

The Indiana Supreme Court held that the notice was sufficient in point of time, and, after a consideration of the decisions of other courts in similar cases, held that the policy only put upon the beneficiary the duty of giving the notice within ten days after she learned that the insured's death was caused by an accident.

It is further insisted that the evidence does not show just what date complainant lost his eye. The evidence shows that Dr. Watkins did not know that he had lost his eye until February 27, 1917, and we hold that he had forty and twenty-one days respectively, from that date within which to give the notice.

As stated in *People's Accident Association v. Smith*, 126 Pa., 317, 17 Atl., 605, 12 Am. St. Rep., 870: "It is our duty to give the policy in question a fair business-like, common-sense interpretation. It is in such sense that the parties to the contract probably understood it. The plaintiff was not claiming for weekly benefits. Had he done so, there would have been more force in the defendant's position that he should have given notice of the accident immediately after its occurrence on September 4th. His claim, however, was for the loss of his eye, and it is difficult to see how he could with

Watkins v. U. S. Casualty Co.

any porpriety make such a claim until he had actually lost it or it had become clear that he would lose it. How could he have truthfully made such a claim on the 5th of September? And had he done so and his eyesight been restored, the probability is the defendant company would have criticized his claim even more closely than it has done now."

It is too well settled to require citation of authorities that such provisions must be construed according to the intention and understanding of the parties, and that they must be construed against the insurer where such construction does not violate the plain provisions of the contract. If the company desires to incorporate in its policy a plain provision to the effect that upon the happening of an accident that may, by some possibility, result in an injury covered by the policy notice must be given within a specified period from the date of the accident, it has the right to do so, but we think the clause in this policy bears no such construction.

In the Metropolitan policy the provision is that: "Written notice must be given of any accident or injury for which a claim is to be made, within twenty-one days, unless the giving of such notice within such time shall not be reasonably possible, in which event such notice must be so given as soon as reasonably possible."

Dr. Watkins had no claim until he lost his eye; therefore he could not make a claim at the time of the accident, for he had not lost his eye at that time. He does not know when he lost his eye, but his first knowledge of the fact was on February 27th, at which time he gave the notice.

Watkins v. U. S. Casualty Co.

The provision of this policy clearly negatives the idea that he was to give notice within twenty-one days after the accident, if the injury, for which there was liability, had not occurred at that time for the reason that he had no claim against the company.

We think the notice provision of the United States Casualty Company policy, properly construed, means just what the notice provision of the Metropolitan Casualty Insurance Company policy says.

Counsel for defendants rely on *Hatch v. United States Casualty Co.*, 197 Mass., 101, 83 N. E., 398, 14 L. R. A. (N. S.), 503, 125 Am. St. Rep., 332, 14 Ann. Cas., 290, in support of their position.

In that case the insured met with a fall on July 7, 1906, but did not consider the accident of any consequence. From August 7th to August 11th he was confined to his bed, and on the latter date died. The notice provision in the policy was as follows:

"Provided written notice of the injury, whether fatal or nonfatal, be given by the insured or the beneficiary to the home office of the company within ten days of the event causing such injury."

That case is distinguishable from the case at bar. The provision in plain terms states that he is not to have ten days from the date of the injury, but that he must give notice within ten days of the event causing the injury, which was the accident on July 7th. The provision "whether fatal or 'nonfatal'" negatives the idea that he has ten days after the injury, or in case of death that the administrator has ten days after the injury; and, in conjunction with the remainder of the clause, makes it plain that the notice must be given

Watkins v. U. S. Casualty Co.

within ten days after the event (accident) causing the injury.

The employer's liability cases, relied on by the defendants, are not at all in point.

The law does not require impossibilities; and, while it appears that Dr. Watkins lost his eye prior to February 27th, he did not have knowledge of the fact until that date, and under all of the authorities notice, within the prescribed period, from the day he obtains knowledge of the injury is sufficient.

It is next insisted by the defendant, United States Casualty Company, that the complainant cannot recover against it because the premium had not been paid on the policy, and that the policy was not in force at the time of the injury.

This position is not supported by the evidence. We find that the premium was actually paid to the company by the local agents for the insured, and was so accepted by it; and, at the time of the accident, the local agents had no claim against the company for a return of this premium.

Dr. Watkins testified that he had an agreement with the local agents, which had been pursued since he began doing business with them, by which he was to pay the premiums at his convenience. There is no escape from the conclusion that the local agents extended this credit to Dr. Watkins, and paid the premium for him and charged it to him.

Dr. Watkins testifies that this local agency dissolved partnership, and that one of the members, Mr. Mathews, told him that in dividing up the assets of the firm that

Watkins v. U. S. Casualty Co.

the account against him (Watkins) had been taken over by him as a part of his assets.

The next defense interposed by the United States Casualty Company is that the facts do not show "loss of the entire sight of one eye" as required by the policy.

Dr. Watkins testifies that: "The sight is gone. I am conscious of light getting into the eye, and occasionally an object will flash without me being able to tell what it is. If I shut my right eye and hold my hand in front of me I cannot see it."

Dr. Lewis testifies that the eye is absolutely useless; no power to see anything directly in front from that eye to read, to see, to recognize a person, or do any kind of work. There is a light perception which comes in from the side, but that cannot be used in any kind of employment. He further testifies that the degeneration is complete, and that there is no chance for any improvement.

Dr. Savage testifies that the eye, for all practical purposes, is blind, and that there is no prospective cure.

The complainant has entirely lost sight in the eye, so far as usefulness goes, and we think this is the obvious meaning of and falls within the intent and spirit of the contract.

The defendant, United States Casualty Company, interposed several other defenses which counsel omit in summoning up its defenses, and we presume these omitted defenses have been abandoned. In any event we find no merit in them.

The Metropolitan Company makes the further defense that when the complainant took out the policy in the United States Casualty Company it failed to give it

Watkins v. U. S. Casualty Co.

notice thereof, and that, therefore, under the provisions of its policy, it is only liable for a certain proportionate part as provided for in the policy.

We find that the company has waived this notice. In July, 1915, Dr. Watkins stuck a thorn in his finger, and made a claim against the Metropolitan Company under this identical policy for the loss. He testifies that he submitted written proof of loss to the company, in which he fully set forth all the policies that he had, including the one in the United States Casualty Company, which the Metropolitan Company is now complaining of, and that in that way he gave notice in writing of the United States Casualty Company's policy to the Metropolitan Company.

Written notice was given to the Metropolitan Casualty Company by Dr. Watkins to produce at the hearing and file as evidence proofs of the aforesaid claim, but the Metropolitan Casualty Company failed to produce and file said written proofs, as it was notified to do. The Metropolitan Casualty Company not only paid the loss, but it failed to cancel the policy, and thereafter collected the premiums on same as they became due.

This proposition is supported by *Westchester Fire Ins. Co. v. McAdoo* (Ch. App.), 57 S. W., 409, and the authorities therein cited.

The record shows that Dr. Watkins is one of the prominent physicians of Memphis, a man of high standing; that he has been carrying these policies for several years and keeping his premiums paid thereon; there is not a suggestion that he has not acted in the utmost good faith in this matter in any particular. When he

Watkins v. U. S. Casualty Co.

became aware of an injury for which these policies indemnified him, he gave the companies immediate notice. There is no question but that he has for all time lost his eye. Neither is there any doubt but that he lost it as a result of an external accident. The very thing which he had been honestly trying to protect himself against and for which he had been expending his money happened, and to defeat which these companies have interposed the defenses which we have discussed herein.

Decrees will be drawn, reversing the chancellor, and awarding to the complainant the sums sued for, with interest.

Patterson v. Tate.

L. G. PATTERSON *v.* M. G. TATE, Sheriff, et al.

LEWIS BARNWELL *v.* SAME.

(*Jackson*, April Term, 1919.)

1. EQUITY. Waiver of demurrers.

Defendants' demurrers to the bills, relied on in their answers, not having been called up or disposed of at the hearing, must be treated as waived. (*Post*, pp. 611-613.)

2. EXECUTORS AND ADMINISTRATORS. Liability of sureties. Statute.

At common law and under Shannon's Code 1917, section 1095, where sureties sign the bond of an executor or administrator in its blank printed form before it has been filled in, they are estopped to deny their liability for money received on the faith of the bond. (*Post*, pp. 613, 614.)

Cases cited and approved: *McLean v. State*, 55 Tenn., 22; *Galbraith v. State*, 78 Tenn., 574; *State v. Polk*, 82 Tenn., 6; *Stevens v. Green County Iron Co.*, 58 Tenn., 71; *Upton v. Philips*, 58 Tenn., 224.

Code cited and construed: Secs. 1095, 1097 (S.).

3. EXECUTORS AND ADMINISTRATORS. Payment of moneys into court. Notice to sureties.

Under Shannon's Code 1917, section 4043, the probate court was authorized to require an administrator to pay into the office of the clerk the balance found to be due the estates of his intestates, and on his failure, and the clerk's motion, was authorized to award execution against the administrator and his sureties for the amount of the balance without any notice of the motion to the sureties; such notice having been given the administrator. (*Post*, pp. 614, 615.)

Code cited and construed: Sec. 4043 (S.).

4. EXECUTORS AND ADMINISTRATORS. Settlement for wrongful death as part of estate. Liability of sureties.

Fund received by administrator of children killed by a railroad in

Patterson v. Tate.

settlement of claims against the road for the wrongful killing of the children constituted part of their estates, and the sureties of the administrator could be held liable for the same under the bond. (*Post*, pp. 615, 616.)

Case cited and approved: *Glass v. Howell*, 70 Tenn., 50.

5. INJUNCTION. Bond. Additional bond.

In suit by the sureties of an administrator to enjoin sale of their property on execution to satisfy an order to pay into the probate court an amount for which the administrator had defaulted, where the original injunction bonds were not in proper form, but conditioned only to pay costs and damages, and were insufficient to cover the amount of the judgment and interest, the chancellor properly required the sureties to execute an additional injunction bond on the hearing of the cases, and before they had been disposed of. (*Post*, pp. 616, 617.)

6. EQUITY. Cross-bill. Protection of cross-complainants by bond.

In suit by sureties on the bond of an administrator of children killed by a railroad to enjoin sale of their property on execution to satisfy an order of the probate court requiring them to pay into court the amount of a settlement made by the administrator with the railroad, the chancellor properly dismissed the crossbill of the mother and brother of the children killed asking decree for the amount shown to be due the estate of the deceased children; the interests of the mother and brother being protected by the injunction bond executed by the sureties. (*Post*, p. 617.)

FROM SHELBY.

Appeal from the Chancery Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—
HON. F. H. HEISKELL, Judge.

Patterson v. Tate.

B. F. Booth and T. H. Johnson, for complainants,
Patterson and Barnwell.

NORMAN M. BYARS, for defendants.

MR. JUSTICE HALL delivered the opinion of the Court.

Some time prior to August 8, 1910, Eddie and Clarence Gaines, two minor children of Katie Gaines, were killed by the Illinois Central Railroad Company in Shelby county, Tenn.

One Sam Carson qualified as the administrator of the estates of said two deceased children in the county court of said county on August 8, 1910, executing an administrator's bond, with L. G. Patterson and Louis Barnwell as sureties, in the sum of \$4,500, and as such administrator received from the railroad company the sum of \$2,000 in full settlement of claims against the railroad company growing out of the killing of his said intestates. He made his final settlement with the clerk of the probate court of Shelby county on November 14, 1912, which showed a balance due the estates of said decedents amounting to the sum of \$1,303.59.

On October 28, 1913, an order was made by the court directing the administrator to pay the sum due from him to said estates into court. Carson having failed to comply with this order, on motion of the clerk, of which Carson was given proper and legal notice, an execution was ordered to issue, against said administrator and his sureties on his administrator's bond for the balance adjudged to be due said estates. An execution was issued in accordance with said order, and was levied on certain real estate belonging to L. G. Patterson, and

Patterson v. Tate.

certain personal property belonging to Louis Barnwell, both sureties on the bond of the administrator, as heretofore stated, to satisfy the balance adjudged to be due said estates from said administrator.

Thereupon Patterson and Barnwell filed separate bills in the chancery court of Shelby county against M. G. Tate, sheriff of said county, and John C. McLemore, clerk of the probate court of said county, the Solvent Savings Bank & Trust Company, and Katie Gaines, mother of said Eddie and Clarence Gaines, seeking to enjoin the sale of their respective properties by the sheriff under said execution, and to enjoin the issuance of further executions in the future having for their purpose the collection of said balance adjudged to be due the estates of said decedents by the probate court.

The bills alleged, among other things, that the bond executed by Carson as such administrator was void in so far as complainants were concerned for the reason that at the time it was presented to them by Carson for their signatures as sureties it had not been filled out and was merely a blank printed form of an administrator's bond, and that they signed the same without the blanks being filled in with respect to names and amounts, and it was subsequently filled out by Carson or his attorney and delivered to the clerk of the probate court of Shelby county without complainants having ratified or approved the same.

It was further alleged in said bills that the order or decree of the probate court was void as to complainants, because the court was without jurisdiction to make the same, no notice having first been issued and served upon complainants of the motion against said administrator

Patterson v. Tate.

and complainants, as his sureties, citing them to appear and show cause why such order or decree should not be rendered against him.

These bills were demurred to by the defendants, and the demurrs were overruled by the court with leave to the defendants to rely on same in their answers and at the hearing.

Thereupon the defendants filed answers relying upon said demurrs therein, but, the demurrs not having been called up or disposed of at the hearing, they must be treated as waived. The answers of defendants denied the allegations of the bills as to the invalidity of the administrator's bond, and the want of the jurisdiction in the probate court to make said order or decree against the administrator for the alleged balance due the estates of his intestates, and also the allegations of said bills that the probate court was without jurisdiction to order an execution against complainants, as sureties of said administrator, for the balance due from said administrator.

The defendant Katie Gaines, in her own right, and on behalf of her minor child, James Gaines, filed a cross-bill, seeking a decree on said administrator's bond in behalf of herself and said minor for the balance alleged to be due, which amount the cross-bill alleged that she and her minor child were entitled to recover of the administrator and his sureties as the heirs and next of kin of the two decedents, Eddie and Clarence Gaines.

Demurrs were interposed to the cross-bill filed by Katie Gaines by the cross-defendants, Patterson and Barnwell, which demurrs were overruled by the chancellor with leave to said cross-defendants to rely on

Patterson v. Tate.

same in their answer and at the hearing, which was done, but said demurrers were never called up, and the action of the chancellor invoked upon them. They will, therefore, also be treated as waived.

Cross-defendants, Patterson and Barnwell, in their answers to said cross-bill interposed the plea of the statute of limitation of six years in bar of their liability on said bond. They also interposed a plea of *non est factum* by which they challenged the validity of said bond upon the same ground alleged in their original bills. The answers further averred that the fund collected by Carson as administrator from the railroad company constituted no part of the estates of his intestates, and that the sureties on his administrator's bond were not liable for such fund.

The two causes were consolidated in the court below. Proof was taken, and upon final hearing the chancellor held that the decree for \$1,303.59 rendered by the probate court against the administrator and his sureties on his bond was a valid decree, and that the execution issued by said court was properly awarded. He therefore dismissed the complainants' bills, and rendered a decree against them and their sureties upon their injunction bonds for the amount of said decree, interest and costs. He dismissed the cross-bill of cross-complainants, Katie Gaines, filed in her own right and on behalf of her minor child, James Gaines, and taxed her with the costs incident to the filing of same, which costs he ordered paid out of money coming into the hands of the clerk and master belonging to said cross-complainant.

From this decree both the complainants in the original bills and the cross-complainant, Katie Gaines, appealed

Patterson v. Tate.

to the court of civil appeals, where the decree of the chancellor was in all things affirmed, and said causes are now in this court upon petitions filed for writ of *certiorari* by both the complainants in the original bills and cross-complainant, Katie Gaines.

The complainants in the original bills insist that the court of civil appeals erred in not holding that the bond executed by Sam Carson, administrator, with complainants as sureties, was void as to them, because the same was signed by them in its blank printed form, and did not constitute a valid and binding obligation upon them as sureties.

It is provided by section 1095 of Shannon's Code (Ann.) 1917 as follows:

"So, also, if any officer or other person, as hereinafter provided, who is required by law or in the course of judicial proceedings to give bond for the performance of an act or the discharge of duty, receives money or property upon the faith of such bond, he and his sureties are estopped to deny the validity of the bond or legality of the proceedings under which the money or property was obtained."

By section 1097 of the same Code it is provided that the provisions of the section above quoted: "apply to the bonds of executors, administrators, guardians, special commissioners, receivers, and others required by law or in the course of judicial proceedings to execute bonds for the performance of particular acts or the discharge of duty."

The section first quoted does nothing more than state the sound common-law principle, and is only an affirmation of the common-law principle of estoppel, that when

Patterson v. Tate.

money has been received on the faith of the bond, the parties to its terms are estopped from denying their liability therefor. *McLean v. State*, 8 Heisk., 22, 255; *Galbraith v. State*, 10 Lea, 574; *State v. Polk*, 14 Lea, 6; *Stevens v. Green County Iron Co.*, 11 Heisk., 71, 78-80; *Upton v. Phillips*, 11 Heisk., 224.

It results, therefore, that complainants having signed said bond with full knowledge that it would be filled out in the matter of dates, amounts, etc., and would be delivered to the clerk of the probate court as the bond of the administrator, and that the administrator would receive the fund belonging to the estates of his intestates upon the faith of said bond, they must be held estopped from denying its validity in accordance with the provisions of the statutes and authorities hereinbefore cited.

It is next insisted by complainants that the court of civil appeals erred in not holding that the probate court of Shelby county was without jurisdiction to render a decree against complainants upon the motion of the clerk of said court, it appearing that no notice of said motion had been given them, and it being insisted that they were entitled to their day in court, and that any judgment or decree rendered against them without such notice is void.

By section 4031 of Shannon's Code (Ann.) 1917 it is provided that after the lapse of two years from the qualification of the executor or administrator the clerk of the county court shall take and state his accounts, and once every year thereafter till the administration is closed.

By section 4043, it is provided: "After the settlement of any administrator's or executor's account, the

Patterson v. Tate.

county court shall compel the representative to pay into the office of the clerk the balance found against him, and may, on motion of the clerk or any distributee, after twenty days' notice to such representative, award summarily an execution against such representative and his sureties for the amount of said balance, as in case of a judgment at law; and when any specific thing is to be done, the county court shall compel the representative, by an order, to perform it, and by process of contempt in case of refusal."

We are unable to find any case in which this section of the Code has been expressly construed. We think, however, that it is clear from the provisions of said section that notice only to the representative is required. The decree of the probate court recites that due and proper notice was given to the administrator in the cause under consideration, and there is no evidence to the contrary. We are of the opinion, therefore, that the court was clothed with authority, under the section of the Code above set out, to make the order requiring the administrator to pay the balance found to be due the estates of his intestates into the office of the clerk; and upon his failure to do so, and upon motion of the clerk, the court was authorized to award an execution against said administrator and the complainants, his sureties for the amount of said balance.

By the third assignment of error it is insisted that the court of civil appeals erred in not holding that the judgment against the administrator and complainants, as his sureties, was void, because the fund received by said administrator from the railroad company in settlement of claims against it for the wrongful killing of

Patterson v. Tate.

the intestates of said administrator did not constitute any part of the estates of said intestates, and the sureties of the administrator could not, therefore, be held liable for the same.

We think this assignment of error is wholly without merit.

It was held in *Glass v. Howell*, 2 Lea, 50, that the sureties of an administrator who has actually collected damages sustained by his intestate by injuries resulting in his death are liable to the extent of the penalty of the administrator's bond for the amount thus collected, although the administrator was permitted by the next of kin to retain the money until certain debts of the intestate, for which the fund was not legally liable, were paid out of it; a credit being allowed for the debts thus paid.

It is next insisted that the court of civil appeals erred in affirming the action of the chancellor requiring the complainants Patterson and Barnwell to execute an additional injunction bond in the sum of \$2,000 on the hearing of said causes, and before they had been finally disposed of.

We do not think so. It appears that the original injunction bonds given by complainants were not in proper form. They were not conditioned to pay the judgment, the collection of which the bills sought to enjoin in the event they were unsuccessful, but were conditioned only to pay costs and damages. Furthermore, it appeared that the original bonds were not sufficient to cover the amount of the judgment and interest. In view of these facts, we think it was entirely within the discretion of the chancellor to order the complainants

Patterson v. Tate.

to give a new or additional injunction bond conditioned to pay the judgment, in the event their bills were not sustained.

We now come to the assignment of error filed by cross-complainant, Katie Gaines, which is to the effect that the chancellor erred in dismissing her cross-bill, and in not rendering a decree under said cross-bill in favor of her and her minor child for the amount shown by the decree of the probate court to be due the estates of Eddie and Clarence Gaines, her deceased children. This insistence is based upon the claim that cross-complainant and her minor child are the sole heirs at law of said two decedents, and are entitled to the proceeds of their estates.

We are of the opinion that there was no error in the decree of the chancellor dismissing said cross-bill, and that the court of civil appeals was correct in so holding. We think the filing of the cross-bill was unnecessary. The interests of the cross-complainant were fully protected by the injunction bond executed by the original complainants.

It results that the decree of the court of civil appeals will in all things be affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
MIDDLE DIVISION

NASHVILLE, DECEMBER TERM, 1919.

CITY OF MEMPHIS *v.* B. A. ENLOE, *et al.*

(*Nashville*, December Term, 1919.)

1. STATUTES. Validity. Title. Railroad commission. Amending acts. Acts 1919, chapter 49, which amended Acts 1897, chapter 10, entitled an act to create a Railroad Commission, defining its powers and duties to prohibit extortion, etc., is not invalid under Constitution, article 2, section 17, which forbids any bill to become a law which embraces more than one subject and declares that all acts which repeal, revive, or amend former laws shall recite in their caption the substance of the law repealed or revived on the theory that the original act related solely to railroads and the amending act was extended so as to embrace other public utilities, as street railroads. (*Post. pp. 621-624.*)

Acts cited and construed: Acts 1919, ch. 49; Acts 1897, ch. 10.

Cases cited and approved: *Bank v. Divine Gro. Co.*, 97 Tenn., 603; *Railroad v. Byrne*, 119 Tenn., 278; *State v. Algood*, 87 Tenn., 163; *Goodbar v. Memphis*, 113 Tenn., 20.

Constitution cited and construed: Art. 2, sec. 17.

City of Memphis v. Enloe.

2. CONSTITUTIONAL LAW. Arbitrary classification. Regulation of street railroads.

An act regulating public utilities, as street railroads, is invalid both under the federal and Tennessee constitutions, if it makes an arbitrary and illegal classification. (*Post*, p. 624.)

Cases cited and approved: *State v. Railroad*, 124 Tenn., 1; *Stratton v. Morris*, 89 Tenn., 534; *Railway v. Ellis*, 155 U. S., 155; *Connolly v. Union Sewer Pipe Co.*, 184 U. S., 540.

3. CONSTITUTIONAL LAW. Right to attack constitutionality of act.

The city of Memphis cannot attack Acts 1919, chapter 49, regulating public utilities, as street railroads, and giving the Railroad Commission jurisdiction over fares, on the ground that the requirement that the public utilities carry for the protection of stockholders a depreciation account, that they keep their books in a certain manner, and that they cannot issue stocks without first obtaining authority from the commission, etc., amounts to an arbitrary and illegal classification; the city not being entitled to complain against such classification of public utilities. (*Post*, pp. 624-626.)

4. CONSTITUTIONAL LAW. Illegal classification. Regulation of public utilities.

The provisions of Acts 1919, chapter 49, that public utilities shall carry for protection of stockholders, etc., a depreciation account, that they shall keep books in a certain manner, and that they shall not issue stocks, etc., without consent of the Railroad Commission, do not render the act invalid on the theory that it arbitrarily classifies' public utilities and discriminates against them. (*Post*, pp. 624-626.)

Case cited and approved: *Noell v. Power Co.*, 130 Tenn., 245.

5. CONSTITUTIONAL LAW. Validity of statute. Persons entitled to question.

Though Acts 1897, chapter 10, provided that no person owning bonds or stocks of any railroad company should serve as a member of the Railroad Commission, the city of Memphis cannot attack the constitutionality of Acts 1919, chapter 49, extending the regulatory powers of the Railroad Commission to public utilities, as street

City of Memphis v. Enloe.

railroads, on the ground that the subsequent act made no such provision; for the city is not, in a suit to enjoin the commission from hearing an application for increase in rates, interested in such provision. (*Post, pp. 626, 627.*)

6. PUBLIC SERVICE COMMISSIONS. Qualification. Ownership of railroad securities.

The provision of Acts 1897, chapter 10, creating the Railroad Commission, that no person owning stocks or bonds of any railroad or transportation company shall serve as commissioner, must be deemed incorporated in Acts 1919, chapter 49, extending the powers of the commission to public utilities, as street railroads, for the two acts after amendment will be read as one. (*Post pp. 626, 627.*)

7. CONSTITUTIONAL LAW. Obligation of contracts. Street railroad rates.

Acts 1919, chapter 49, extending the powers of the Railroad Commission to public utilities and allowing the commission to investigate and fix rates, is not invalid as impairing the obligation of contract in violation of Constitution U. S. and Constitution Tenn. article 1, section 20, as to the city of Memphis, which had previously by ordinance fixed the rate which street railroad company doing business therein might charge. (*Post, pp. 627-630.*)

Cases cited and approved: *Denver & So. Platte Ry. Co. v. City of Englewood*, 62 Colo., 229; *Home Telegraph Co. v. Los Angeles*, 211 U. S., 265; *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S., 368; *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S., 496; *Providence Bank v. Billings*, 4 Pet., 514; *Railroad Commission Cases*, 116 U. S., 307; *Freeport Water Co. v. Freeport City*, 180 U. S., 587; *Lynn v. Polk*, 76 Tenn., 121.

Case cited and distinguished: *Collingswood Sewerage Co. v. Borough of Collingswood*, 105 Atl., 209.

FROM DAVIDSON.

City of Memphis v. Enloe.

Appeal from the Chancery Court of Davidson County.
—Hon. J. B. NEWMAN, Chancellor.

H. J. LIVINGSTON, City Attorney, for appellant.

FRANK M. THOMPSON, Attorney-General, and WRIGHT,
MILES, WARING & WALKER, for appellees.

MR. CHIEF JUSTICE LANSDEN delivered the opinion of
the Court.

This case was brought to enjoin the Railroad Commission, composed of Messrs. Enloe, Welch, and Hannah, from hearing an application filed by the receivers of the Memphis Street Railway Company, asking authority to increase the fare for passengers on its street cars in excess of five cents. The basis of the bill is that chapter 49, Acts of 1919, is unconstitutional and void. The chancellor held the act valid and dismissed the bill, and complainant appealed to this court. The court considered the case one of general importance and advanced it upon the docket for hearing. A number of errors have been assigned, but they present the general question that the act assailed is void. We will discuss the objections made to the act in the order in which they appear in the briefs, and therefore a fuller statement of the purposes of the bill is not deemed important.

The first objection to the act is that it violates section 17 of article 2 of the Constitution, which forbids any "bill to become a law which embraces more than one subject, that subject to be expressed in the title.

City of Memphis v. Enloe.

All acts which repeal, revive or amend former laws, shall recite in their caption, or otherwise, the title or substance of the law repealed, revived or amended."

It is said that the act in question is invalid because the act amended, under an appropriate caption, relates solely to steam railroads; and this act, while purporting to amend it, expressly provides that its provisions, and none of the powers conferred upon the Railroad and Public Utilities Commission by the amendatory act, shall relate to such railroads.

We think the fundamental error in this contention lies in the fact that learned counsel considers chapter 10 of the Acts of 1897, as relating alone to the subject of railroads. While it does relate to railroads, the subject expressed in the title is not confined to railroads. It is an act "to create a Railroad Commission in this State and define its duties and powers; to prohibit extortion, unjust discrimination and undue or unreasonable preference by railroad companies and other persons operating railroads in this State, in their charges for transportation of freight and passengers; to secure just and reasonable rates and charges for all such services; and to impose penalties and to provide civil remedies for and punish violation of, this act, and to secure the due execution and enforcement of its provisions, and all lawful orders, rules and regulations of the said Railroad Commission." The amendment made was to "change the name of the Railroad Commission, to increase its powers and functions, and to embrace within its jurisdiction and powers all other public utilities." It will thus be seen that the original act relates alone to steam railroads and their regulation.

City of Memphis v. Enloe.

while this amendment, in addition to changing the name of the commission, increases its powers and functions so as to embrace within its jurisdiction and powers all other public utilities. It is immaterial that the amendatory act excludes steam railroads from the operation of the amendment, because the original act relates to them. It is not a substantial objection, if made, that the two provisions of the act as amended are not homologous. They are all public utilities, and the legislature can deal with them together better than separately. It is true that the title of the amendatory act does not state that steam railroads are to be excepted from the operation of the amendatory act. But this is not material, because steam railroads are dealt with in the original act. The amendment proposed is to change the name of the Railroad Commission, and to increase its powers and functions so as to embrace within them all other public utilities. The use of the word "other" might indicate the intention of the legislature to exclude steam railroads. At all events, it indicates that the legislature knew that steam railroads were public utilities dealt with by the act of 1897, and desired to expand the original act so as to increase its powers and functions. We do not think the case of *Bank v. Divine Gro. Co.*, 97 Tenn., 603, 37 S. W., 390, cited by complainants, is contrary to this holding.

The case of *Railroad v. Byrne*, 119 Tenn. 278, 104 S. W., 460, seems to be controlling on this branch of the bill. This amendatory act does recite the caption of the amended act, and we think the provisions of the amendatory act are germane to the original act and embraced within the title thereof. *State v. Algood*, 87 Tenn., 163,

City of Memphis v. Enloe.

10 S. W., 310; *Goodbar v. Memphis*, 113 Tenn., 20, 81 S. W., 1061. The original act is an act to create a Railroad Commission and define its duties and powers. The amendatory act changes the name of the Railroad Commission and increases its powers and functions. It is well understood, we think, that the generality of the title of a bill is no objection to the bill, provided it conveys a reasonable understanding of the subject of legislation; and it is equally well understood that the body of the act need not fill up the title.

It is also said that the act in question makes arbitrary and illegal classifications, and for these reasons is void. It is well settled that an act is void, both under the laws of Tennessee and of the United States, which makes an arbitrary and illegal classification. *State v. Railroad*, 124 Tenn., 1, 135 S. W., 773; *Stratton v. Morris*, 89 Tenn., 534, 15 S. W., 87, 12 L. R. A., 70; *Railway v. Ellis*, 165 U. S., 155, 17 Sup. Ct., 255, 41 L. Ed., 666; *Connolly v. Union Sewer Pipe Co.*, 184 U. S., 540, 22 Sup. Ct., 431, 46 L. Ed., 679.

But we are of opinion that the act in question is not open to this assailment. The assault is, specifically, that the requirement in the act that public utilities carry for the protection of stockholders, bondholders, or other securities a depreciation account; that they keep their records, books, and accounts in a certain manner; that they cannot issue stocks, bond certificates, bonds, debentures, or other evidences of indebtedness payable in more than one year without first obtaining authority from the commission; that they cannot lease, merge, or consolidate any of their properties, rights, or franchises without the approval of the commission; that they can-

City of Memphis v. Enloe.

not acquire any privilege or franchise without the approval of the commission; that such utility has the right to appeal to the commission from any order or regulation made by any local, municipal, and county governing body; the power of the commission to require such utilities to construct and operate, extend or abandon the service—made the act void because introduced by the amendatory act and not contained in the original act. It is said that these requirements of public utilities other than steam railroads create an illegal and arbitrary classification against them. Under authority of *Noell v. Power Co.*, 130 Tenn., 245, 169 S.W., 1169, and many other cases, we think the city of Memphis cannot complain at an alleged unlawful classification and discrimination against these utilities. The city of Memphis is not a steam railroad or other public utility, and owns no interest in such a utility, and makes no complaint in its bill against such a utility. Therefore the question is academic in this case. However, we do not desire to be understood as being doubtful of the effect of the provision referred to. It is within the power of the legislature to make the classifications made in this act as between steam railroads and other public utilities. Street railways are not the only public utilities dealt with by the act. The requirements of public utilities above set out may easily be referred to the general public interest, rather than to an arbitrary classification against such utilities. Most steam railroads have their stocks and bonds, etc., quoted on the market exchange, and they have statements of their financial condition prepared for public inspection. Steam railroads must make complete statements of

City of Memphis v. Enloe.

their financial condition to the Railroad Commission; and this becomes a public record for the inspection of all interested. It would seem that they have substantially the same burden cast upon them in this respect which the amendatory act casts upon other utilities. The other regulations of street railways can be enforced by the commission because most of them are wholly within the State, and none of them make an interstate tariff. Steam railroads are interstate as well as intrastate, and it is not within the jurisdiction of the commission to enforce its regulations in other States. A railroad is an entirety, and all of its bonds, stocks, or other evidences of indebtedness cover the entire road, and consequently the commission has no jurisdiction to enforce the regulations of the amendatory statute against such an interstate road. We think this distinction is just and reasonable, and not unlawful.

We do not think the city of Memphis can complain that the original act provides that no person owning bonds or stocks of any railroad or transportation company or connected therewith, shall serve as a member of the Railroad Commission, and that each member of the commission shall take an oath stating affirmatively that he is not so interested or connected. The city is not interested in this suit in this provision, if indeed the requirements of the original act would not incorporate these provisions within the amendatory act. The act, after amendment, will be read together and as one act. *Byrne v. Railroad*, supra. The qualifications prescribed in the original act for the commissioners will still obtain notwithstanding the amendment. If this provision had been inserted in the amendment it would have been

City of Memphis v. Enloe.

in the act twice—both in the original and in the amendment.

At the time of the passage of this amendment the city of Memphis had an ordinance forbidding street railway companies from making charges for passenger fare in excess of five cents, etc. The amendment assailed empowers the Public Utility Commission to hear complaints, or to investigate upon its own motion any matter concerning any public utility, and to fix just and reasonable individual rates, joint rates, tolls, fares, charges, or schedules, whenever the commission shall determine any existing individual rate, joint rate, toll, fare, charge or schedule thereof is unjust or unreasonable, howsoever the same may have heretofore been fixed or established. The commission is also given power to hear and determine whether any increase in individual rates, joint rates, tolls, fares, charges, or schedules made by any public utility is just and reasonable. It is said that this provision is violative of the 14th Amendment to the Constitution of the United States, and section 20 of article 1 of the Constitution of Tennessee. The act complained of is modeled after a similar act of New Jersey, approved April 21, 1911 (P. L., p. 374). The Court of Errors and Appeals of New Jersey (*Collingswood Sewerage Co. v. Borough of Collingswood*, 105 Atl., 209) use this language in reference to their act:

“The Collingswood Sewerage Company was incorporated under chapter 210 of the Laws of 1898. . . . Its right to construct a sewerage system in the borough of Collingswood was conferred by the legislative grant contained in the statute. The exercise of that right,

City of Memphis v. Enloe.

however, was suspended by the mandate of the legislature until it obtained from the borough its consent to the construction of such system within its municipal limits. The statute also provided that the municipal authorities should annex to their consent, which should be by a formal ordinance, the maximum prices or rents to be charged to property owners for use of the sewerage system. . . .

"One of the principal grounds of appeal is that the ordinance of the borough and the acceptance by the sewerage company of the provisions thereof constitute an inviolable contract between the parties which the Board of Public Utilities Commissioners has no power to set aside or disregard. We concur in the disposition made of this contention by the Supreme Court, and in the reasoning of Mr. Justice Swayze upon the point. We observe, however, in this opinion, what seems to us to be an inaccurate expression, namely, that 'an ordinance of this kind is a grant upon condition rather than a contract.' The statute of 1898 does not exhibit any purpose on the part of the legislature to clothe the municipalities affected thereby with authority to grant to sewerage companies organized thereunder any franchise, right, power, or privilege whatever. On the contrary, all of the franchises, rights, powers, and privileges vested in these companies, including the right to lay pipes in the public streets, come to them by direct legislative grant. The authority conferred upon the municipalities is the right to suspend the present enjoyment of them by refusing to consent to the user of their streets, except upon conditions which they may name. And even in the withholding of such consent, and in

City of Memphis v. Enloe.

the imposition of conditions if the consent be accorded, the municipalities are exercising a mere delegated authority, are acting as mere agents of the legislature. It cannot be doubted that, if the right to use the streets of the borough of Collingswood had been granted by the State to the sewerage company without condition or limitation, and the sovereign itself had fixed the maximum charges to be made, it would have power to change the rate whenever in its judgment conditions arose which justified such action. To hold that by delegating the rate-fixing power to its creature it had deprived itself of the right thereafter to modify the rate would be tantamount to declaring that the creature is greater than the creator. It would be strange indeed if the State, which has power to terminate the existence of the municipalities created by it whenever it may see fit, could not revoke authority granted by it to them, and, in the exercise of its sovereignty, cancel conditions which it had permitted them to impose upon other classes of corporations which had also been created by it."

Other cases in accord are *Denver & So. Platte Ry. Co. v. City of Englewood*, 62 Colo., 229, 161 Pac., 151; *Home Telegraph Co. v. Los Angeles*, 211 U. S., 265, 29 Sup. Ct., 50, 53 L. Ed., 176; *Detroit v. Detroit Citizens' St. Ry. Co.*, 184 U. S., 368, 382, 22 Sup. Ct., 410, 46 L. Ed., 592; *Vicksburg v. Vicksburg Waterworks Co.*, 206 U. S., 496, 508, 27 Sup. Ct., 762, 51 L. Ed., 1155; *Providence Bank v. Billings*, 4 Pet., 514, 561, 7 L. Ed., 939; *Railroad Commission Cases*, 116 U. S., 307, 6 Sup. Ct., 334, 388, 1191, 29 L. Ed., 636.

City of Memphis v. Enloe.

The power of the city to regulate public utilities is quite generally considered a power of government continuing in its nature, and which cannot be bargained away. One of the cases states conditionally that, if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. *Freeport Water Co. v. Freeport City*, 180 U. S., 587, 21 Sup. Ct., 493, 45 L. Ed., 679.

In this state it has been held that the general governmental powers of the State cannot be bargained away. *Lynn v. Polk*, 8 Lea, 121.

The result is that we are of opinion, after an investigation of the act and the authorities, that the act is not violative of any provision of the Constitution of this state, or of the United States. The chancellor so held, and his decree is affirmed.

McGannon v. Farrell.

M. C. McGANNON *v.* NORMAN FARRELL *et ux.**

SAME *v.* EDWARD BUFORD *et ux.*

(Nashville. December Term, 1919.)

1. EVIDENCE. Parol evidence. Restrictions.

A free and unrestricted grant by deed cannot be varied by parol evidence that grantee agreed to erect only certain kinds of buildings upon the land. (*Post*, pp. 631-644.)

Cases cited and approved: Bedford et al. *v.* Flowers, 30 Tenn., 242; Ellis *v.* Hamilton, 36 Tenn., 512; Bryan *v.* Hunt, 36 Tenn., 544; Price *v.* Allen, 28 Tenn., 703; McLean *v.* State, 55 Tenn., 22; Fields *v.* Stunston, 41 Tenn., 40; Stewart *v.* Insurance Co., 77 Tenn., 104; Weisinger *v.* Bank, 78 Tenn., 330; Insurance Co. *v.* Mathews, 76 Tenn., 508; Railroad *v.* Gammon, 37 Tenn., 571; Kearly *v.* Duncan, 38 Tenn., 400; Betts *v.* Demumbrune, 3 Tenn., 48; Leinan *v.* Smart, 30 Tenn., 308; Cobb *v.* Wallace, 45 Tenn., 539; Lytle *v.* Bass, 47 Tenn., 303; Stewart et al. *v.* Insurance Co., 77 Tenn., 104; Van Leer *v.* Fain, 25 Tenn., 104; Dick *v.* Martin, 26 Tenn., 263; Mitchell *v.* Bank, 27 Tenn., 216; Cobb *v.* O'Neal, 34 Tenn., 438; Cobb *v.* Wallace, 45 Tenn., 539; Bissenger *v.* Guiteman, 53 Tenn., 277; Hicks *v.* Smith, 72 Tenn., 459; Breeden *v.* Grigg, 67 Tenn., 163; Waterbury *v.* Russell, 67 Tenn., 162; Brady *v.* Isler, 77 Tenn., 356; Barnard *v.* Roan Iron Co., 85 Tenn., 139; Trout *v.* N. & W. Railway Co., 107 Va., 576; Lewis *v.* Turnley, 97 Tenn., 197; Hines *v.* Wilcox, 96 Tenn., 148.

Cases cited and distinguished: Seitz *v.* Brewers' Refrigerating Machine Co., 141 U. S., 510; Adams *v.* Gillig, 199 N. Y., 314; L. & N. R. R. Co. *v.* Willbanks, 133 Ga., 15.

2. EVIDENCE. Parol evidence. Admissibility.

Ordinarily, parol evidence is inadmissible to contradict a written agreement. (*Post*, pp. 631-644.)

*For authorities passing on the question of the general rule that parol evidence not admissible to vary, add to, or alter a written instrument, see note in 17 L. R. A., 270.

McGannon v. Farrell.

3. EVIDENCE. Admissibility. Parol evidence.

Parol evidence is admissible to establish an independent or collateral agreement not in conflict with a written contract, or where original contract was verbal and only a portion of it was reduced to writing. (*Post*, pp. 631-644.)

FROM DAVIDSON.

Error to the Circuit Court of Davidson County.—
Hon. M. H. MEEKS, Judge.

KEEBLE & SEAY and SMITH & BERRY, for plaintiff in error.

E. J. SMITH and NORMAN FARRELL, JR., for defendants in error.

MR. JUSTICE HALL delivered the opinion of the court.

These suits were instituted separately in the circuit court of Davidson county—one by Norman Farrell, Sr., and wife, Josephine E. Farrell, and the other by Edward Buford and wife, Lazinka E. Buford, against Dr. M. C. McGannon—but, on the hearing, were consolidated; separate judgments being rendered in each case. They were tried by the court without the intervention of a jury.

The predicate of said suits is this: In 1907 Mrs. Louise E. Yandell owned a lot on Elliston place at the corner of Twenty-Third avenue in the city of Nashville, Tenn., which she offered for sale for \$5,500. The defendant, McGannon, offered her \$5,000 for said lot.

McGannon v. Farrell.

Negotiations continued until the defendant finally offered to pay Mrs. Yandell \$5,000 for said lot and assume the taxes for the current year, and also to pay the cost of a sidewalk which had been laid in front of the premises. The sale was negotiated and made for Mrs. Yandell, who was at the time temporarily in Europe, by her brother-in-law, Edward Buford, her duly appointed attorney in fact, through a real estate agent by the name of A. G. Merritt, the representative of R. W. Turner & Co., real estate brokers operating and doing business in the said city of Nashville.

No written contract was executed by the parties except the deed of conveyance. This deed was signed by Edward Buford, as attorney in fact for Mrs. Yandell. The consideration expressed in the deed was \$5,000, the assumption of the 1907 taxes, and the cost of the sidewalk. No other writing passed between the parties, and Mrs. Yandell is not a party to either of the present suits.

The deed of conveyance executed by Edward Buford, the attorney in fact of Mrs. Yandell, is a general warranty deed, and conveys the absolute unrestricted title in fee of said lot to the defendant.

Upon the trial in the circuit court the plaintiffs offered parol evidence by which it was attempted to show that it was a part of the contract of sale that the defendant was to erect upon the lot conveyed a handsome residence for himself fronting on Elliston place or Church street, with an equally attractive entrance on Twenty-Third avenue, and of such a character as would be a credit to the neighborhood and would improve the adjoining property of the plaintiffs, in consideration of

McGannon v. Farrell.

Mrs. Yandell reducing the price of said lot from \$5,500 to \$5,000, and the plaintiffs paying the real estate agent's commissions on the sale, amounting to about \$200, which commissions were paid by them in anticipation of the enhancement of the value of their adjoining property as a result of the erection of such residence by the defendant; that this contract was breached by the defendant, who did not build upon said lot such residence, but later conveyed said lot to a third person, who subsequently erected much cheaper and less attractive buildings upon said lot, buildings not in consonance with the buildings on plaintiffs' adjoining property and other buildings in that neighborhood, which is a high-class residential section, which buildings greatly impaired the value of plaintiffs' adjoining property; that, as a result of said breach by defendant, they are entitled to recover of him damages sustained by their adjoining property.

This evidence was duly excepted to by the defendant at the time it was offered, but was admitted over said exception by the trial judge, who, after hearing all the proof offered in said cases, rendered a judgment against the defendant in favor of Farrell and wife for the sum of \$6,250 and costs of suit, and a judgment in favor of Buford and wife for \$5,500 and costs of suit.

The trial judge made and filed a written finding of facts upon the request of the defendant, which is made a part of the record in said cases, in which said agreement is found to be substantially as herein stated.

From these judgments the defendant appealed to the court of civil appeals, after his motions for a new trial had been duly made, considered, and overruled.

McGannon v. Farrell.

Numerous errors were assigned by the defendant in the court of civil appeals, which need not be set out in detail in this opinion. Only two of said assignments of error were passed on by the court of civil appeals. These are the first and second assignments. The first is: "Under the facts as found by the trial judge the plaintiffs were not entitled to recover, and it was error not to dismiss their suits at plaintiffs' costs."

The second is: "There is no evidence to support the finding of facts by the court in favor of the plaintiffs, and there is no evidence to support the judgment of the court in plaintiffs' favor against the defendant in either case."

Upon a consideration of said cases by the court of civil appeals, that court was of the opinion that the alleged parol contract sought to be set up was void for uncertainty and indefiniteness, and for this reason plaintiffs could not enforce the same. The court of civil appeals, however, did not dismiss the plaintiffs' suits, but modified the judgment of the circuit court in each case so as to allow the plaintiffs nominal damages in the sum of \$5, and taxed the defendant with all the costs in each case. Said cases are now before this court for review by petitions for writs of *certiorari* filed by both plaintiffs and the defendant.

It is insisted by the assignments of error accompanying the petition of the defendant that the court of civil appeals erred in not dismissing the plaintiffs' suits under its holding that the contract sued on was void for uncertainty, and in awarding the plaintiffs a recovery for nominal damages.

McGannon v. Farrell.

It is further insisted that the court of civil appeals erred in not passing upon and sustaining defendant's assignment in that court to the effect that the trial court erred in admitting, over the objection of the defendant, proof tending to set up and establish the parol agreement hereinbefore referred to with respect to the building of the residence upon said lot by the defendant, because the effect of said proof was to vary or contradict the terms of the deed, which conveyed to the defendant an absolute and unrestricted title in said property, and was therefore inadmissible.

Upon the other hand, it is insisted by the plaintiffs in their assignments of error that the court of civil appeals erred in modifying the judgments of the trial court for the reasons stated in its opinion.

We are of the opinion, after a careful examination of the record, petition, and assignments of error of the defendant, that said suits should have been dismissed by the court of civil appeals. If it be conceded that the alleged parol agreement with respect to the building of said residence by the defendant was sufficiently definite to constitute a valid binding agreement, which question, however, need not be passed upon, still we are of the opinion that said agreement could not be established by parol proof, because it is in direct contravention of the terms of the deed, which conveyed to the defendant an absolute unrestricted title to said property. The effect of the parol agreement, if permitted to be shown, would be to ingraft upon the defendant's title a restriction or incumbrance, which is not only not expressed in the deed, but is repugnant to its terms.

McGannon v. Farrell.

It appears from both the evidence and the trial court's written finding of facts that the alleged parol agreement was a part of the general negotiations for the sale of the lot. The language of the deed is clear and unambiguous, and purports to embody the whole contract between the parties. Such an agreement as plaintiffs seek to set up by parol proof would be inconsistent with the unconditional ownership and the free and unrestricted use of the property by the defendant, and would be in direct opposition to the deed itself, which, as before stated, conveyed to the defendant an absolute and unconditional title, free from restriction of any sort, with a covenant of general warranty and a covenant against incumbrances.

The general rule is that parol evidence is not admissible to contradict a written agreement, whether simple or by deed. *Bedford et al. v. Flowers*, 11 Humph., 242; *Ellis v. Hamilton*, 4 Sneed, 512; *Bryan v. Hunt*, 4 Sneed, 544, 70 Am. Dec., 262; *Price v. Allen*, 9 Humph., 703; *McLean v. State*, 8 Heisk., 22; *Fields v. Stunston*, 1 Cold., 40; *Stewart v. Insurance Co.*, 9 Lea, 104; *Weisinger v. Bank*, 10 Lea, 330; *Insurance Co. v. Mathews*, 8 Lea, 508; *Railroad v. Gammon*, 5 Sneed, 571; *Kearly v. Duncan*, 1 Head, 400, 73 Am. Dec., 179.

But this rule does not apply in cases where the parol evidence in no way contradicts or alters the terms of the written contract, but tends to establish an independent or collateral agreement not in conflict with it. *Betts v. Demumbrune*, Cooke, 48; *Leinau v. Smart*, 11 Humph. 308; *Cobb v. Wallace*, 5 Cold., 539, 98 Am. Dec., 435; *Lytle v. Bass*, 7 Cold., 303; *Stewart et al. v. Insurance Co.*, 9 Lea, 104; *Van Leer v. Fain*, 6 Humph., 104.

McGannon v. Farrell.

Nor does it apply in cases where the original contract was verbal and not in writing, and a part only of it was reduced to writing. *Van Leer v. Fain*, 6 Humph., 104; *Dick v. Martin*, 7 Humph., 263; *Mitchell v. Bank*, 8 Humph., 216; *Cobb v. O'Neal*, 2 Sneed, 438; *Cobb v. Wallace*, 5 Cold., 539, 98 Am. Dec., 435; *Bissenger v. Guiteman*, 6 Heisk., 277; *Hicks v. Smith*, 4 Lea, 459; *Breeden v. Grigg*, 8 Baxt., 163; *Waterbury v. Russell*, 8 Baxt., 162; *Brady v. Isler*, 9 Lea, 356; *Barnard v. Roan Iron Co.*, 85 Tenn., 139, 2 S. W., 21.

In *Seitz v. Brewers Refrigerating Machine Co.*, 141 U. S., 510, 12 Sup. Ct., 46, 35 L. Ed., 837, the court said:

"Undoubtedly, the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form any part or parcel of it. And when the writing itself upon its face is couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking were reduced to writing."

In *Adams v. Gillig*, 199 N. Y., 314, 92 N. E., 670, 32 L. R. A. (N. S.), 127, 20 Ann. Cas., 910, the court said:

McGannon v. Farrell.

"An oral restrictive covenant, or any oral promise to do or refrain from doing something affecting the property about which a written contract is made and executed between the parties, will not be enforced, not because the parties should not fulfill their promises and their legal and moral obligations, but because the covenants and agreements being promissory and contractual in their nature and a part of or collateral to a principal contract, the entire agreement between the parties must be deemed to have been merged in the writing."

The court, continuing, said: "A strict enforcement of such rule tends to greater security and safety in business transactions, and leaves less opportunity for dishonesty and false swearing, induced, perhaps, by a change of purpose or a failure to obtain the result that was anticipated when the transaction was originally consummated and reduced to writing. Such rule makes it necessary for the parties to a written contract to include everything therein pertaining to the subject-matter of the principal contract, and if by mistake or otherwise an oral agreement, a part of the transaction, is omitted from the writing, it can only be made effective and enforceable by a reformation of the writing, so that the same shall include therein the entire agreement between the parties. The rule is quite universal that statements promissory in their nature and relating to future actions must be enforced, if at all, by an action upon the contract."

Trout v. N. & W. Railway Co., 107 Va., 576, 59 S. E., 394, 17 L. R. A. (N. S.), 702, was a case where the plaintiff sought to show by parol that the true consideration of a deed, which was recited to be a sum of

McGannon v. Farrell.

17, 1916, a bill was filed to recover the amount of a promissory note for \$1,500 and interest; the same being one of a series of four notes which were executed by defendants as part payment of the purchase price of a lot in Davidson county, Tenn., conveyed by the complainant to the defendant Frances F. Deeds.

In said deed there were certain restrictions and conditions, among others, "it is agreed that no residence or dwelling house shall be erected or kept on said land costing less than \$10,000."

The deed retained a lien to secure the payment of the purchase-money notes, and the bill prayed for a foreclosure thereof.

The defendant undertook to set up, as a defense, a verbal agreement on the part of the complainant, through its agents, to repurchase said lot at the end of any year for five years at cost.

No such agreement was incorporated in the deed, and it was not claimed that it was omitted therefrom by fraud, accident, or mistake.

In passing upon the right of the defendant to set up this alleged oral agreement, the court said:

"By their answer, Deeds and wife admit the execution of a proposition by Deeds and wife to purchase the lot. They admit the execution of the deed in accord with the proposition, and they admit the execution of the purchase-money notes, including the one in suit. These are the written evidence of the transaction between the parties, and on the face of these papers the sale of the lot appears to be absolute in character, and wholly executed so far as concerned the vestiture of title, subject only to a retained lien and the restric-

McGannon v. Farrell.

tions as to the cost of residence, etc. But by the cross-bill it is sought to add to the terms of the contract, evidenced by all these papers, a conditional agreement that the vendor will, at the option of the vendee, within a time specified, repurchase the lot from the vendee at cost, thus in effect converting the transaction into a sale on condition, and varying the plain terms of the deed."

The court further said: "The allegation and proof of fraud accident, surprise, or mistake, as the cause of the failure of the parties to incorporate into the written evidence of the transaction the entire contract on the terms of which the minds of the parties met, is indispensable."

Further authorities could be cited in support of the conclusion reached, but further citation is unnecessary. It is not contended that the defendant, McGannon, was guilty of any fraud in the negotiations for the sale of said property. It is not averred or shown that the failure of the parties to incorporate into the deed the agreement now sought to be set up was the result of fraud, accident, or mistake, and a reformation of the deed is not asked for.

We have carefully examined the cases of *Betts v. Demumbrune*, Cooke, 39; *Van Leer v. Fain*, 6 Humph., 113; *Leinau v. Smart*, 11 Humph., 308; *Lewis v. Turnley*, 97 Tenn., 197, 36 S. W., 872; *Hines v. Wilcox*, 96 Tenn. 148, 33 S. W., 914, 34 L. R. A., 824, 832, 54 Am. St. Rep., 823, which are relied on by the plaintiffs below to support their contention that parol evidence is admissible to set up and establish the agreement forming the basis for their suits, and we are of the opinion

McGannon v. Farrell.

that said cases are not controlling. In all of those cases the parol evidence offered in no way contradicted or altered the terms of the written contract, but tended to establish an independent, collateral agreement not in conflict with it.

It results, therefore, that we are of the opinion that said parol agreement cannot be looked to or considered by the court for any purpose, and that both the trial court and the court of civil appeals were in error in not so holding.

It results that the judgments of the lower courts will be reversed, and the plaintiffs' suits will be dismissed, with costs.

Vertrees v. State Board of Elections.

**JOHN J VERTREES *et al.* v. STATE BOARD OF ELECTIONS
*et. al.***

(*Nashville. December Term, 1919.*)

1. ELECTIONS. Woman suffrage. Validity.

Acts 1919, chapter 139, authorizing women to vote for presidential and vice presidential electors, is valid under Constitution, article 7, section 4, providing the election of all officers not otherwise provided for by the Constitution shall be made in such manner as legislature may direct. (*Post, pp. 650-657.*)

Acts cited and construed: Acts 1919, ch. 139.

Cases cited and approved: *Ledgerwood v. Pitts*, 122 Tenn., 570; *Scown v. Czarnecki*, 264 Ill., 305; *Hanna v. Young*, 84 Md., 179; *State v. Hanson*, 80 Neb., 724; *State v. Dillon*, 32 Fla., 545; *Spitzer v. Fulton*, 172 N. Y., 285; *Richardson v. Young*, 122 Tenn., 471; *Wheeler v. Brady*, 15 Kan., 26; *State v. French*, 96 Ohio St., 172.

Constitutions cited and construed: Art. 1, sec. 5; Art. 4, sec. 1; Art. 3, sec. 2; Art. 6, secs. 3, 4, 13, 15; Art. 7, secs. 1, 4.

2. TAXATION. Poll tax. Statute. Validity. Tax on women.

Constitution article 2, section 28, making male citizens liable for poll taxes, etc., does not impliedly prohibit the legislature from imposing a poll tax on women. (*Post, pp. 657-660.*)

3. TAXATION. Legislative power.

Right to tax is essential to the existence of government, and the legislative power in this respect can only be restricted by distinct and positive expressions in the Constitution. (*Post, pp. 657-660.*)

4. ELECTIONS. Woman suffrage. Validity.

Acts 1919, chapter 139, authorizing women to vote at certain elections and requiring them to furnish evidence of payment of poll taxes in same manner as men, etc., does not discriminate against men upon ground that no poll tax is levied against women, since

Vertrees v. State Board of Elections.

such difference is due, not to the suffrage act, but to Constitution, article 2, section 28, requiring males to pay poll taxes, and legislature's failure to pass a law taxing women. (*Post*, pp. 657-660.)

Acts 1919, chapter 139, authorizing women who have resided within

Cases cited and approved: *Kuntz v. Davidson County*, 74 Tenn., 65.

Codes cited and construed: Secs. 1220, 1221, 813a2, 1226 (T.-S.).

Constitution cited and construed: Art. 2, sec. 28.

5. ELECTIONS. Woman suffrage. Validity.

Acts 1919, chapter 139, authorizing women who have resided within county for preceding six months to vote at municipal elections, etc., does not repeal Nashville city charter (Private Acts 1919, chapter 22, section 5), requiring a six months' residence in city before voting; and suffrage statute is therefore not invalid upon ground that it discriminates by allowing women to vote after a shorter city residence than is required of men. (*Post*, pp. 661, 662).

6. STATUTES. Repeal by implication. General and special laws.

A general law does not repeal a special law unless such a legislative intent clearly appears. (*Post*, pp. 661, 662.)

Acts cited and construed: Acts 1919, ch. 139; Acts 1919, ch. 22, sec. 5.

Case cited and construed: *Burnett v. Maloney*, 97 Tenn., 697.

7. STATUTES. Title. Sufficiency. Woman suffrage act.

Constitution, article 2, section 17, requiring statutes to contain only one subject expressed in the title, is not violated by Acts 1919, chapter, 139, authorizing women to vote at certain elections. (*Post*, p. 662.)

Constitution cited and construed: Art. 2, sec. 17.

8. ELECTIONS. Ballot boxes. Joint resolution of legislature. Effect.

A joint resolution by the legislature purporting to empower election boards to provide separate ballot boxes for women, conferred no additional power on election officers, but may be considered as an expression of legislative advice and opinion that election officers already had necessary power to take such steps. (*Post*, pp. 662-666.)

Vertrees v. State Board of Elections.

9. ELECTIONS. Woman suffrage. Ballot boxes.

Election officers have power to provide separate ballot boxes for women in order to prevent fraud, especially in view of the joint resolution of legislature recommending and directing such a course. (*Post*, pp. 662-666.)

10. ELECTIONS. Woman suffrage. Validity.

Acts 1919, chapter 139, authorizing women to vote for certain officers, etc., is not void because affording opportunity for fraud, since separate ballot boxes may be provided for women, and thereby eliminate the danger that they will fraudulently vote for officials not entitled to be elected by their votes. (*Post*, pp. 662-666.)

Acts cited and construed: Acts 1919, ch. 139.

Code cited and construed: Sec. 1266 (T.-S.).

11. ELECTIONS. Woman suffrage. Validity. "Qualified voters." Municipal election. Voting credit.

Notwithstanding Acts 1919, chapter 139, authorizing women to vote at municipal elections, Constitution, article 2, section 29, providing that a municipality's credit should not be given or loaned except after an election by "qualified voters," etc., precludes women from voting upon such propositions, since "qualified voters" means male voters. (*Post*, pp. 666, 667.)

Acts cited and construed: Acts 1919, ch. 139.

Constitution cited and construed: Art. 2, sec. 29.

12. ELECTIONS. Woman suffrage. Validity.

Whether Acts 1919, chapter 139, section 3, requires women voting at municipal elections to produce poll tax receipts need not be decided, since municipalities having poll tax requirements should apply them to women whenever the legislature levies a poll tax upon females. (*Post*, pp. 668-674.)

BACHMAN, J., dissenting.

Acts cited and construed: Acts 1919, ch. 139, sec. 3.

Cases cited and approved: Gardner v. Hall, 61 N. C., 22; Kuntz v. Davidson County, 74 Tenn., 65; Brewer v. McClelland, 144 Ind., 423; Kinneen v. Wells, 144 Mass., 497-503; Lyman v. Mar-

Vertrees v. State Board of Elections.

tin, 2 Utah, 145; Attorney General v. City of Detroit, 78 Mich., 545; In re Appointment of Supervisors, 52 Fed., 261; Coggeshall v. City of Des Moines, 138 Iowa, 730.

Cases cited and distinguished: Morris v. Powell, 125 Ind., 281; Stratton Claimants v. Morris Claimants, 89 Tenn., 534; Fleming v. Memphis, 126 Tenn., 337; Malone v. Williams, 118 Tenn., 437.

Constitution cited and construed: Art. 7, sec. 4; Art. 11, sec. 8; Art. 2, sec. 28.

FROM DAVIDSON.

Appeal from the Chancery Court of Davidson County.—Hon. JAMES B. NEWMAN, Chancellor.

FRANK M. THOMPSON, Attorney-General, KEEBLE & SEAY, E. N. HASTON and G. T. FITZHUGH, for appellants.

JOHN J. VERTREES, JOHN ALLISON, E. J. SMITH, W. E. NORVELE, JR., and W. O. VERTREES, for appellees.

MR. JUSTICE GREEN delivered the opinion of the Court.

This bill was filed by Mr. Vertrees and other citizens and taxpayers of Davidson county against the member of the State board of elections, the comptroller of the State, and election commissioners of Davidson county. It alleged that the officers named as defendants were taking steps to effectuate chapter 139 of the Acts of 1919, known as the woman's suffrage law. It was averred that the said act was unconstitutional for

Vertrees v. State Board of Elections.

various reasons stated, and it was sought to enjoin the several officials named from proceedings in the premises.

A demurrer was interposed by the defendants, which challenged the sufficiency of all the constitutional objections urged against the statute. The demurrer was overruled by the chancellor, and an injunction granted as prayed in the bill. From this decree the chancellor permitted an appeal to this court.

No question is made upon the right of the complainants to maintain this suit, if, indeed, any such question could be made.

Chapter 139 of the Acts of 1919 is set out in the margin.¹

¹Acts 1918. Chapter No. 139.

An act granting women the right to vote for electors of President and Vice President of the United States, and for municipal officers, to participate and vote in certain matters and elections; and prescribing the qualifications and conditions under which women may exercise such right of suffrage.

Section 1. Be it enacted by the General Assembly of the State of Tennessee, that all women, citizens of the United States of and above the age of twenty-one years, having resided in the State for one year and in the county for six months preceding any election therein, and who shall be an inhabitant of the election district or precinct in which they offer to vote, shall be entitled and allowed to vote at such elections for electors of President and Vice President of the United States, and for all officers of cities, towns and taxing districts, and upon all questions or propositions submitted exclusively to a vote of the electors of such municipalities.

Sec. 2. Be it further enacted, that where registration is required at such elections, women who are entitled to vote under the preceding section of this act shall register in the same manner as male voters, and their names shall be received and registered by the various boards of registration, at the time and in the manner required by law for other voters, and they shall be liable to all penalties attached to the violation of such law.

Sec. 3. Be it further enacted, that where satisfactory evidence of the payment of poll taxes assessed against them for a certain period

Vertrees v. State Board of Elections.

is required to be furnished at such election by male voters, women who are entitled to vote under the preceding sections of this act in elections for electors of President and Vice President of the United States, shall likewise furnish evidence of the payment of poll taxes assessed against them, in the same manner required by law of other voters.

Sec. 4. Be it further enacted, that this act take effect from and after its passage, the public welfare requiring it.

Passed April 14, 1919.

SETH M. WALKER,
Speaker of the House of Representatives.

ANDREW L. TODD,
Speaker of the Senate.

Approved April 17, 1919.

A. H. ROBERTS, Governor.

Generally speaking, it authorizes women of lawful age to vote in elections for municipal officers and to vote for electors for President and Vice President, and to vote upon all questions or propositions submitted exclusively to a vote of the electors of any municipality. Other provisions of the act will be noted in the course of the opinion.

It is said that the legislature was without power to pass such an act under the Constitution of Tennessee, and it is further said that if such power be conceded to the legislature, it was not exercised in this instance in a constitutional manner.

We think the question of the power of the legislature to pass such a law is absolutely an open question in this State, and is not touched by any previous decision of this court.

There are certain expressions in the opinion of this court in *Ledgerwood v. Pitts*, 122 Tenn., 570, 125 S. W., 1036, upon which counsel for both sides have seized, as justifying their respective positions. The question for decision in *Ledgerwood v. Pitts* was the validity

Vertrees v. State Board of Elections.

of a compulsory primary law. There was no occasion in that case for this court to make any declarations as to the bearing of the Constitution upon elections to any office, State or municipal. It was only necessary for the court to decide whether any provisions of the Constitution related to the selection of party nominees for office. Other things were *dicta*, and furnish no authority for the arguments of counsel in this case.

What are called the suffrage clauses of the Constitution of Tennessee are as follows:

Article 1, section 5: "That elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon a conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by a court of competent jurisdiction."

Article 4, section 1: "Every male person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the country wherein he may offer his vote for six months, next preceding the day of election, shall be entitled to vote for members of the general assembly and other civil officers for the county or district in which he resides; and there shall be no qualification attached to the right of suffrage, except that each voter shall give to the judges of elections where he offers to vote, satisfactory evidence that he has paid the poll tax assessed against him for such preceding period as the legislature shall prescribe, and at such time as may be prescribed by law; without which his vote cannot be received. And all male citizens of the State shall

Vertrees v. State Board of Elections.

be subject to the payment of poll taxes and to the performance of military duty, within such ages as may be prescribed by law. The general assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box."

In addition of the sections above quoted, it is provided in article 3, section 2, that "the Governor shall be chosen by the electors of the members of the general assembly at the time and places where they shall respectively vote for the members thereof." In article 6, section 3, it is provided that "the Judges of the Supreme Court shall be elected by the qualified voters of the State." In article 6, section 4, it is provided that "the judges of the circuit and chancery courts, and of other inferior courts shall be elected by the qualified voters of the district or circuit to which they are to be assigned." In article 6, section 13, it is provided that clerks of inferior courts shall be elected by the "qualified voter" of their county or district. In article 6, section 15, it is provided that justices of the peace or constables shall be elected by the "qualified voters" of their district. In article 7, section 1, it is provided that the sheriff, trustees, and register shall be elected in each county by the "qualified voters" thereof.

From the foregoing it is seen that the Constitution provides for the election of members of the general assembly and civil officers of the county or district by "male persons." Likewise, the Governor must be elected by voters with the same qualification, that is to

Vertrees v. State Board of Elections.

say, "male persons." It is provided with respect to the other elective officers mentioned in the Constitution that they shall be chosen by "qualified voters."

It is conceded by the defendants herein that the constitutional provision with reference to the qualifications of persons who may vote for members of the general assembly and civil officers of the county or district is exclusive; that the legislature may not add to these qualifications nor subtract therefrom; and that accordingly the legislature cannot authorize any but male persons to vote in elections for these officers.

It is furthermore conceded that the phrase "qualified voters" as used in the Constitution, with respect to the election of officers therein named, means male voters. In other words, it is conceded that section 1, article 4, of the Constitution defines what "qualified voters" are, and that none but such voters can participate in the election of any officer who is required by the Constitution to be selected by "qualified voters." This, then, excludes female voters as to the election of all such officers.

The argument for the defendants is that inasmuch as no provision is made in the Constitution of Tennessee with reference to the selection of municipal officers, and with reference to the selection of electors for President and Vice President, it is competent for the legislature to provide for the selection of such officers in any manner and by any means that the legislature deems proper.

Our constitutional provisions are somewhat different from those of any other State. Most of the State Constitutions under which questions like the one before

Vertrees v. State Board of Elections.

us have arisen provided that every male citizen should be entitled to vote in all elections, or in any election. Under such constitutional provisions as these, the majority of the courts have held that the elections referred to were elections for officers mentioned in the Constitution, and that as to elections for officers not named in the Constitution, it was permissible for the legislature itself to prescribe the qualifications of voters, and therefore, when the particular question arose, permissible for the legislature to authorize women to vote in elections for such officers. *Scown v. Czarnecki*, 264 Ill., 305, 106 N. E., 276, L. R. A., 1915B, 247 Ann. Cas., 1915A, 772; *Hanna v. Young*, 84 Md., 179, 35 Atl., 674, 34 L. R. A., 55, 57 Am. St. Rep., 396; *State v. Hanson*, 80 Neb. 724, 115 N. W., 294; *State v. Dillon*, 32 Fla., 545, 14 South., 383, 22 L. R. A., 124; *Spitzer v. Fulton*, 172 N. Y., 285, 64 N. E., 957, 92 Am. St. Rep., 736, and other cases collected in the note Ann. Cas., 1915A, 802.

We are presented with no such problem of construction, however, under the Constitution of Tennessee. Our Constitution defines "qualified voters," and provides that certain officers shall be elected by such "qualified voters." We might with little difficulty, therefore, say that inasmuch as the Constitution has enumerated certain officers to be chosen by "qualified voters," such limitation upon the manner of the selection of officers not enumerated was impliedly excluded. But, as stated above, no problem of construction confronts us in the matter, and this is so by reason of the provisions of article 7, section 4, of our Constitution, as follows:

"The election of all officers, and the filling of all vacancies not otherwise directed or provided by this

Vertrees v. State Board of Elections.

Constitution, shall be made in such manner as the legislature shall direct.

This section of the Constitution was considered by this court in *Richardson v. Young*, 122 Tenn., 471, 125 S. W., 664. The same provision was contained in the Constitution of 1834. Acting under such constitutional authority, it was shown in *Richardson v. Young* that for many years the legislature had without question provided for the selection of officers, other than constitutional officers, in any manner that it thought best. In numerous cases the legislature had selected these officers itself. In numerous other cases it had authorized the appointment of such officers by the Governor. In several cases the legislature had delegated the power to select such officers to other officials or boards or commissions. It is not worth while to go over these things here. Since *Rishardson v. Young*, supra, was decided the legislature has continued the exercise of its constitutional authority to provide for the selection of officers, not mentioned in the Constitution, in various ways, and many instances may be found in the more recent statutes.

Since municipal officers are not referred to in the Constitution, and there is no provision in that instrument as to the manner of their selection, and since presidential and vice presidential electors are not referred to in the Constitution, and no mention is made as to the manner of their selection (and this doubtless could not be regulated by the State Constitution), the conclusion inevitably follows that, under the provisions of section 4 of article 7 of the Constitution, the election of such officers "shall be made in such manner as the

Vertrees v. State Board of Elections.

legislature shall direct." It is thus competent for the legislature to provide that such officers may be selected by other instrumentalities, or the legislature itself may select them. The legislature perhaps might confer the power to select such officers upon the women alone. "There is no limitation of the agencies it may employ." *Richardson v. Young*, supra. As we see it, there is absolutely no restriction upon the power of the legislature to authorize women to participate in the selection of such officers. This authority of the legislature is not only not negatived by anything in the Constitution, but is expressly sanctioned by the language of section 4 of article 7.

Section 4, of article 7 seems too plain to permit of any doubt as to its meaning. A like provision was contained in the Constitution of the State of Kansas. There was nothing in the Kansas Constitution as to how school district officers should be chosen, although there was a suffrage clause in the Constitution of that State restricting the right of voting to males in all elections. The Kansas court entertained no doubt of the authority of the legislature under these conditions to confer upon women the right to vote in school district elections. *Wheeler v. Brady*, 15 Kan., 26.

In the Ohio Constitution there was likewise a provision similar to section 4 of article 7 of our Constitution, and there was also a constitutional provision restricting the right of suffrage to males in all elections. There was, however, still another provision in the Ohio Constitution that any municipality might adopt a charter of its own framing and exercise thereunder the power of local self-government, subject to certain re-

Vertrees v. State Board of Elections.

strictions. The city of East Cleveland adopted a charter conferring upon women the right to vote for all municipal elective officers, and the validity of this section of the charter having been assailed, it was sustained by the Supreme Court of Ohio as a valid exercise of the power granted to municipal corporations. *State v. French*, 96 Ohio St., 172, 117 N. E., 173, Ann. Cas., 1918C, 896.

Without further comment, therefore, on this branch of the case, we are satisfied that it was within the power of the legislature of Tennessee to confer on women the right to vote for electors for President and Vice President and for municipal officers.

Coming now to the objections to this particular statute, it is said to be unconstitutional for that it arbitrarily discriminates against male voters, in that it frames the election laws so as to require male voters to produce satisfactory evidence that the poll taxes assessed against them have been paid, while it exempts female voters from that obligation.

To clear up the situation we may observe that we find no restriction in the Constitution upon the power of the legislature to impose poll taxes on women.

Article 2, section 28, of the Constitution, provides that: "All male citizens of this state over the age of twenty-one years, except such persons as may be exempted by law on account of age or other infirmity, shall be liable to a poll tax not less than fifty cents, nor more than one dollar per annum."

It is contended that this constitutional expression of the class and gender on whom the poll tax shall be imposed is a restraint of the power of the legislature

Vertrees v. State Board of Elections.

to impose the tax on the opposite gender. That is to say, by implication the Constitution prohibits the legislature from imposing a poll tax upon women.

This argument ignores the well-settled principle that a constitutional limitation upon the power of taxation will never be inferred or implied. The right to tax is essential to the existence of government, and is peculiarly a matter for the legislature, and the legislative power in this respect can only be restrained by a distinct and positive expression in the fundamental law.

"The power of taxation being essential to government, and being usually confided in the largest measure to legislative discretion, constitutional limitations upon its exercise will not be inferred or implied, but must be distinctly and positively expressed." 37 Cyc., 727; 1 Cooley on Taxation (3d Ed.), p. 177.

See cases collected in these authorities.

This rule was clearly recognized by this court in the case of *Kuntz v. Davidson County*, 6 Lea (74 Tenn.), 65. In this case the defendant was a subject of the King of Prussia, although he resided in Davidson county. It was insisted that the constitutional provision rendering male citizens liable for poll tax impliedly excluded males who were not citizens. Such an idea, however, was rejected by the court, and it was held that inasmuch as there was no constitutional restriction upon the power of the legislature in this respect, it might levy a poll tax upon male inhabitants as well as upon male citizens.

With reference to the payment of poll taxes, section 3 of chapter 139 of the Acts of 1919 provides, in sub-

Vertrees v. State Board of Elections.

stance, that where satisfactory evidence of the payment of poll taxes assessed against them is required to be furnished by male voters proposing to participate in elections, like evidence of the payment of poll taxes assessed against them shall be furnished by women proposing to participate in elections.

Chapter 139 of the Acts of 1919 did not attempt to levy or assess any poll taxes against women. Perhaps such an undertaking would not have been within its scope.

Under the provisions of sections 1220 and 1221, Thompson's Shannon's Code, every qualified voter under the Constitution and laws is required to produce satisfactory evidence that he has paid the poll taxes assessed against him as a condition precedent to voting.

Under section 813a2, Thompson's Shannon's Code, every male inhabitant between the ages of twenty-one and fifty years, except persons who are deaf, dumb, blind, or incapable of labor, etc., is assessed with a poll tax.

It is urged that, since no poll tax has as yet been assessed or levied against any woman, and all men with certain exceptions are assessed with a poll tax and required to exhibit satisfactory evidence of payment thereof as a condition precedent to voting, an arbitrary and illegal discrimination is thus made between female voters and male voters, which renders the statute before us unconstitutional and void.

Chapter 139 of the Acts of 1919, in itself manifestly places no burden upon male voters, nor do we think this statute confers any immunity upon female voters. The statute expressly requires that female voters shall, in

Vertrees v. State Board of Elections.

all cases, produce satisfactory evidence of the payment of poll taxes assessed against them where a like duty is cast upon male voters.

The basis of the argument made must be referred to the omission of the legislature to pass an act assessing women with a poll tax.

The statute before us does not give to women any immunity from the payment of poll taxes, but particularly recognizes and declares their liability to such taxation when levied.

If any burden is placed upon male voters, it results from the statute, which levies a poll tax upon them.

The whole ground of the argument of illegal distinction lies in the present condition of the law, whereby men are required to pay a poll tax and women are not.

This classification of the sexes for purposes of poll taxation is made by the Constitution itself. That instrument mandatorily declares that all male citizens shall be liable to a poll tax. There is no such mandate as to women.

The Constitution of the State thus licenses the discrimination of which complaint is made, and, as a matter of course, a constitutional discrimination cannot be unconstitutional.

When the poll taxes shall have been exacted of women, then the provisions of section 1226 of Thompson's Shannon's Code, imposing a penalty upon persons voting without having complied with the poll tax requirements of sections 1220 and 1221, heretofore referred to, will apply to women equally with men, and there will be no discrimination of any sort.

Vertrees v. State Board of Elections.

The act is further assailed for that it authorizes women to vote in municipal elections upon a residence in the State for one year, and in the county for six months, preceding the election. The charter of Nashville provides that persons qualified by the general election laws of the State may vote in that city, provided "that no person shall be qualified to vote for mayor or commissioner who shall not have been a *bona-fide* resident of such city for at least six months immediately preceding the day of such election."

It is maintained that, by reason of the charter provision above quoted, no male can vote in a Nashville city election for mayor or commissioner unless he has been a resident of that city for six months, but that a woman otherwise qualified, who has resided in the State and county for six months, may, under the act of 1919, vote in such an election. In other words, the point is that a man must reside in Nashville for six months before he can vote for mayor and commissioner, but no such residence in the city is required of a woman.

We do not think this result follows the passage of chapter 139 of the Acts of 1919.

The charter of Nashville provides that those possessing the qualifications of voters under the general election laws shall be entitled to vote in Nashville if they have resided there for six months. Chapter 139 of the Acts of 1919 is a general election law, and gives to women the qualifications of voters for certain elections. They, like all other qualified voters, must reside in Nashville for six months in order to be entitled to vote in that city. This is necessarily true, unless it can be said that chapter 139 of the Acts of 1919 effects in

Vertrees v. State Board of Elections

favor of women a partial repeal of section 5 of chapter 22 of the Private Acts of 1919; the latter act being the charter of the city of Nashville.

Certainly, the former act cannot be taken as a repeal of any portion of the latter. The woman suffrage act is a general law, applicable to the whole State. The charter of Nashville is a local and special law applicable alone to that city.

It is well settled that a general law does not by implication repeal a special law, unless such legislative intent clearly appears. This rule has been expressed and applied by this court in *Burnett v. Maloney*, 97 Tenn., 697, 37 S. W., 689, 34 L. R. A., 541, and other cases. Many illustrations will be found in Lewis' *Sutherland Statutory Construction*, section 274 et seq.

Since therefore, the charter provision of Nashville is not repealed or modified by the provisions of the general statute respecting woman's suffrage, women who intend voting in Nashville must reside there six months prior to the election just as men, and there is no discrimination.

We do not think that chapter 139 of the Acts of 1919 is in conflict with section 17 of article 2 of the Constitution. It is not worth while to discuss this matter, but it is sufficient to say that after a careful consideration we are of opinion that only one general subject is expressed in the title of the statute, and the body of the statute, in our opinion, conforms to this statute.

It is again contended that the statute before us is void because it imperils the purity of the ballot box, and affords dangerous opportunities for fraud. It is

Vertrees v. State Board of Elections.

said to violate public policy and the constitutional providing for the purity of elections.

The constitutional provision respecting the purity of the ballot box is that the legislature is authorized to enact laws to secure the same.

The pith of these objections is that no separate ballot box is provided for women by the act conferring the right of suffrage upon them. It is said that women are only entitled to vote for certain officers in a general election, to wit, for electors for President and Vice President; that in election districts where the Dortch law prevails they will be furnished with a ballot which contains the names of all candidates for all the offices to be filled at that election, which ballot is to be secretly marked; and that women may thus be enabled to fraudulently mark and cast ballots, illegally expressing their choice for officers in whose election they are not allowed to participate. Likewise, in districts where the 3x7 ballot is used, women might place in the box ballots containing the names of candidates for whom they were not entitled to vote.

This would be a serious and perhaps fatal objection to the administration of this statute, if, indeed, the officers of elections were without power to provide a separate ballot box for the votes of women. There is little in our election laws respecting the ballot box.

In section 1266, Thompson's Shannon's Code, it is said: "The ballot box is any receptacle provided by the officer or person holding an election for receiving the ballots, which box is to be kept locked or otherwise well secured, until the election is finished."

Vertrees v. State Board of Elections.

From this it seems that the ballot box is to be furnished by the officer or person holding the election, and that it shall be kept locked until the election is finished.

We have in Tennessee a state board of elections, consisting of three members, who appoint election commissioners for each county in the State, and the county election commissioners appoint an election officer, judges, clerks, etc. Some of the duties of these officials are prescribed in the statute. Others are not. We suppose it to be impossible to create any office and at the same time enumerate every duty which the officer is expected to perform. In every case something must be left to implication. Some powers are necessarily inferred from others granted. Our election officers in every election have to attend to certain details which are not set out in our election laws.

It is obvious that the votes of women and the votes of men will have to be kept separate in the general elections in order to insure a fair election. It was conceded on argument by counsel for the complainants that if one ballot box was filled at any particular election before the election was over, the officer thereof might procure another ballot box in which to receive the remaining votes; this being a detail.

That is, the power to provide a box implies the power to provide boxes, when necessary to hold a full and fair election.

After the passage of chapter 139 of the Acts of 1919, a resolution was passed by both houses of the legislature in the following language:

“Whereas the present General Assembly of the State of Tennessee has passed a bill granting suffrage

Vertrees v. State Board of Elections.

to women of Tennessee in presidential and municipal elections, therefore be it resolved by the Senate, the House of Representatives concurring, that the State and county boards of election be and the same are hereby empowered and directed to make any and all provisions for the faithful execution of said act by providing separate ballot boxes or otherwise as may be required."

Of course this resolution was not effective to confer any additional power on our election officers, or to amend any existing law. The resolution, however, can be looked to as an expression of the opinion of the legislature and as an expression of legislative advice.

The election officers get all their power from the legislature, and if the legislature had supposed that these officers lacked power to provide separate ballot boxes, the legislature would have conferred such power by statute, in order to accomplish the purposes of the suffrage act. Since the legislature, however, passed no statute, but merely adopted this resolution, we may take it as an expression of the legislative opinion that the election officers had all the power necessary, and the resolution was offered as advice from the legislature as to how the power was to be exercised.

We are not disposed to adopt a view contrary to that of a co-ordinate branch of the government about a matter of this sort. And we accept as correct the opinion of the legislature expressed as indicated, that the election officers have the power to provide separate ballot boxes, and we take it as a matter of course that the election officers will adopt the advice of the legislature and duly provide separate ballot boxes, for elec-

Vertrees v. State Board of Elections.

tions in which candidates are running for only part of whom women are entitled to vote.

We think there is no necessity for preparing different ballots for the women, and no such thing should be attempted where the Dortch Law prevails, in view of the very specific regulations of our statutes as to the form of ballots to be used. The women can simply check off the names of the presidential electors for whom they wish to vote. If the names of candidates for other officers are cross-marked on ballots placed in the women's box, such marks will be disregarded.

Where the 3x7 ballot is used, we see no objection to a special ballot for women containing only the names of the candidates for presidential electors for whom they wish to vote. If they cast ballots containing the names of candidates for other offices, such other names will be disregarded.

A separate ballot box solves the entire difficulty.

In addition to the right to vote for municipal officers and electors for President and Vice President, the suffrage act before us undertakes to confer upon women the right to vote upon all questions or propositions submitted exclusively to a vote of the electors of municipalities.

Section 29 of article 2 of the Constitution of Tennessee provides that: "The credit of no county, city, or town shall be given or loaned to or in aid of any person, company, association or corporation, except upon an election to be first held by the qualified voters of such county, city or town, and the assent of three-fourths of the votes cast at said election."

Vertrees v. State Board of Elections.

Upon the proposition, therefore, of giving or lending the credit of a city or town to or in aid of any person, company, association, or corporation, three-fourths of the "qualified voters" of such city or town who may vote must assent. Such an election is a constitutional election in the sense that none but "qualified voters" under the Constitution can participate therein. It is not seriously denied, and cannot be, under the authorities that "qualified voters," in a constitutional sense, means male voters. It follows, therefore, that, notwithstanding the provisions of chapter 139 of the Acts of 1919, women may not vote in elections upon propositions of this sort.

This refers, of course, merely to elections in which it is proposed to lend or give a credit of the city or town to some person, company, association, or corporation. We do not refer to elections upon propositions to issue municipal bonds for municipal purposes, nor to elections upon any other proposition or question, except where the matter is regulated by the Constitution adversely to the participation of women.

There is no occasion for an elision of any portion of this statute. It is only a question of the proper interpretation of the statute, and we construe the language conferring on women the right to vote upon all municipal questions or propositions to mean that they may vote on all such questions or propositions except those questions or propositions the determination of which is, by the Constitution, confided to male voters. To save the constitutionality of the statute, it is our plain duty, under familiar canons, so to restrict the scope of the general words used.

Vertrees v. State Board of Elections.

Referring again to section 3, it has been suggested that this section of the statute only intended to require of women the production of a poll tax receipt (when the tax should be assessed) as a prerequisite to voting in elections for electors for President and Vice President, and that this section did not intend to make such requirements of women in municipal elections. Whether this be a proper construction of section 3 or not, we need not decide. Since women are made municipal voters by this statute, in all municipalities where a poll tax requirement as to voters therein exists, such a requirement must be exacted of women whenever the legislature levies a poll tax upon them. This is true for the reason heretofore stated, since the provisions of the special statutes incorporating municipalities will prevail over any language of the general law here under consideration, when the two statutes are to be applied to the affairs of a particular municipality, except in some features where the latter act was clearly intended to repeal. ,

Chapter 139 of the Acts of 1919 was passed after long discussion and after the failure of similar acts in previous legislatures. It embodies a policy deliberately adopted by the legislature of the State after much agitation. All bias as to such policy must be scrupulously laid aside in the consideration of the constitutionality of the act.

The objections to this act have been presented with all the force and learning possible. These arguments harmonize with what were doubtless the preconceived notions of many of the profession. When the matter is probed, however, nothing is to be found in the Con-

Vertrees v. State Board of Elections.

stitution which limits the power of the legislature in the premises, except in the one particular noted.

We likewise think the power has been validly exercised. It results that the decree of the chancellor is reversed, and this bill dismissed. We are of opinion, as indicated, that the act did not confer upon the women of Tennessee authority to vote upon any proposition of lending or giving municipal credit, but it does not appear that any such proposition is anywhere imminent at this time, and there is no need to retain the bill for this reason.

One-third of the costs will be paid by the defendants. Two-thirds of the costs will be paid by the complainants.

BACHMAN, J. (dissenting).

While it is clear that the legislature may, under the provisions of our Constitution, and especially by virtue of section 4 of article 7 thereof, extend the right of suffrage to women in elections for officers not contemplated by the Constitution, I am of the opinion that the suffrage act under consideration (chapter 139 of the Acts of 1919) does not present a constitutionally valid exercise of legislative authority, for the reason that it is discriminatory and violative of article 11, section 8, of the Constitution. Under our Constitution women may be lawfully subjected to the payment of poll taxes. Article 2, section 28, as pointed out, contains no positive inhibition against the power of the legislature to impose poll taxes on women, and, as applicable to the power of taxation, such limitation cannot be implied, but must be definitely and positively expressed. The reason of the right of the state to im-

Vertrees v. State Board of Elections.

pose a poll tax is because of the protection afforded by the government to the individual. (*Gardner v. Hall*, 61 N. C., 22; *Kuntz v. Davidson County*, 6 Lea [74 Tenn.], 65), and, as stated in the latter case, the imposition is considered to be a wise one, as constituting a qualification for the privilege of exercising the elective franchise.

It is not to be doubted that, in order to be valid, any attempted regulation of the right of suffrage must not only be reasonable, but must be uniform and impartial in its application to all classes of voters alike. Cooley's Constitutional Limitations (7th Ed.), 907; *Morris v. Powell*, 125 Ind., 281, 25 N. E., 221, 9 L. R. A., 326; *Brewer v. McClelland*, 144 Ind., 423, 32 N. E., 299, 17 L. R. A., 845; *Kinneen v. Wells*, 144 Mass., 497-503, 11 N. E., 916, 59 Am. Rep., 105; *Lyman v. Martin*, 2 Utah, 145; *Attorney General v. City of Detroit*, 78 Mich., 545, 44 N. W., 388, 7 L. R. A., 99, 18 Am. St. Rep., 458; *In re Appointment of Supervisors* (C.C.), 52 Fed., 261.

It is to be noted that the majority of the foregoing authorities present the question of registration as a qualification of the right to vote, but the same are particularly applicable in principle to the question before us. All citizens with reference to the exercise of the elective franchise—a privilege as distinguished from a right—whether qualified under constitutional provision, or legislative grant, should stand equal before the law, and the conferring of equal privinleges which all in the same class should possess imposes equal burdens and obligations which all should be made to assume. As stated in *Morris v. Powell*, supra: "One class of voters cannot be required to possess qualifi

Vertrees v. State Board of Elections.

cations which are not required of all others." One voter must possess the same qualifications as another. He need possess no more.

"Indeed, it is true, if a State of the American Union prescribes for a portion of its citizens otherwise entitled to vote, prerequisites for voting from which other citizens are relieved, to that extent the State ceases to maintain a republican form of government. . . ." *In re Appointment of Supervisors*, supra.

Section 8 of article 11 of the Constitution provides, in substance, that the legislature shall have no power to pass any law granting to individuals any rights, privileges, immunities, or exemptions, other than such as may be by the same law extended to any member of the community who shall be able to bring himself within the provisions of such law. I am clearly of the opinion that section 3 of the act under consideration is violative of the above provision. In so far as the same applies to municipal elections, or the voting upon propositions submitted to a vote of the electors of municipalities, women are authorized to vote without any requirement as to the payment of poll taxes, or the furnishing of evidence of the payment of same; while, as a prerequisite to the same right to vote in the same elections, with women, men are required to pay and furnish evidence of the payment of poll taxes. Thus an inequality repugnant to the mandates of our organic law is created by the statute, an immunity directly prohibited is conferred,, and a forbidden exemption is sought to be authorized.

While section 3 of the act provides that in elections for electors for President and Vice President women

Vertrees v. State Board of Elections.

shall furnish evidence of the payment of poll taxes assessed against them in the same manner required by law of other voters, this cannot be held to obviate the unlawful discrimination prohibited, for the reason that, while the legislature may require women to pay poll taxes, it has not yet done so, and the requirement in the future of a qualification not warranted by any existing law is a nullity, and imposes no obligation. In other words, the legislature cannot by indirection constitutionally do that which it may not do directly. To require that evidence of the payment of poll taxes as a right to vote be furnished by women, when none can be lawfully collected, is a vain and idle requirement. It is not that the legislature has failed to impose poll taxes on women which renders the act obnoxious to the Constitution; but that the act, as passed, is discriminatory, in that for the exercise of the same right one class is relieved from burdens mandatorily required of another. The fact that some men, because of age or other infirmity, are permitted to vote without the payment of poll taxes, cannot be made the basis for argument that it is no discrimination for women to vote without making such payment and exhibiting evidence thereof, for the reason that such exemption is expressly made by the Constitution and cannot be complained of. Women, as a class, are subject to the assessment and payment of poll taxes, and upon their being assessed therefor the constitutional exemptions would apply to individual cases the same as to men. Further than this, they can claim as a class no constitutional immunity. I am unable to see wherein the attempted classification is not purely arbitrary and wholly lacking in that rea-

Vertrees v. State Board of Elections.

sonableness necessary to maintain it as a constitutional enactment.

"If the classification is made under article 11, section 8, of the Constitution, for the purpose of conferring upon a class the benefit of some special right, . . . immunity, or exemption, there must be some good and valid reason why that particular class should alone be the recipient of the benefit. *Stratton Claimants v. Morris Claimants*, 89 Tenn., 534, 15 S. W., 95, 12 L. R. A., 70.

And, as stated by the present Chief Justice in *Fleming v. Memphis*, 126 Tenn., 337, 148 S. W., 1058, 42 L. R. A. (N. S.), 493, Ann. Cas., 1913D, 1306:

"But this classification must not be mere arbitrary selection. It must have some basis which bears a natural and reasonable relation to the objects sought by the legislation."

So in *Malone v. Williams*, 118 Tenn., 437, 103 S. W., 810, 121 Am. St. Rep., 1002, in passing upon discriminatory legislation with reference to elections in the city of Memphis, Judge Neil says:

"No good reason can be conceived why the city of Memphis should be elevated above the other communities covered by the act, or depressed below those communities, as the case may be, and placed in a class by itself, whereby, in the use of the elective franchise, it is relieved of the burdens imposed upon other communities by the provisions of the act referred to, and of those acts which the latter act amends, or why its people should be deprived of the safeguards vouchsafed to other communities by the said act of 1897, and its congeners."

Vertrees v. State Board of Elections.

The difference in sex, or the fact that only limited suffrage is granted by the act, cannot be made the basis of classification. The case of *Coggeshall v. City of Des Moines*, 138 Iowa, 730, 117 N. W., 309, 128 Am. St. Rep., 221, cited in support of the reasonableness of the classification attempted to be made by the act of 1919, is not applicable. The right there conferred upon women was limited to participation in the determination of questions of municipal indebtedness, and, as pointed out, when exercised was advisory only. Here is granted the right to equally participate in many elections, choosing most important State and municipal officials, in whose selection the votes of all are of equal weight and effect, and finally and definitely determine incumbency to office. Section 8 of article 11 of the Constitution recognizes no degrees of immunities or exemptions. That women cannot participate in all elections is because of the inhibitions of the Constitution. In those elections where they may vote, their rights, qualifications, and privileges should be the same as other voters; no more, no less.

Lebanon & Big Spring Turnpike Co. v. State.

LEBANON & BIG SPRING TURNPIKE CO. V. STATE.

(*Nashville. December Term, 1918.*)

CRIMINAL LAW. Court, in absence of defendant not charged with felony. Can enter plea of not guilty.

Where a corporation, charged with failure to repair a turnpike owned and operated by it, was duly served with process and voluntarily entered appearance, by demurring and applying for continuance, but did not plead, the trial court, under Thompson Shannon Code, section 7173, was authorized to enter plea of not guilty for it in its absence from the court; Constitution, article 1, section 9, providing that accused hath the right to be heard by himself and his counsel, etc., applying only to charges of felony.

Cases cited and approved: McGinnis v. State, 28 Tenn., 43; State v. Sexton, 121 Tenn., 35; Witt v. State, 45 Tenn., 11; Andrews v. State, 34 Tenn., 551; Armstrong v. State, 41 Tenn., 338.

Constitution cited and construed: Art. 1, secs. 6, 9, 14.

FROM WILSON.

Error to the Circuit Court of Wilson County.—Hon. LILLORD THOMPSON, Special Judge.

WILLIAM A. GUILD and W. C. CHERRY, for plaintiff in error.

The Attorney-General, for the State.

MR. CHIEF JUSTICE LANSDON delivered the opinion of the Court.

The plaintiff in error was indicted in the criminal court of Wilson county for failure to repair a turnpike

Lebanon & Big Spring Turnpike Co. v. State,

which it owned and was operating in that county. Two individuals were joined with it, but they were dismissed upon demurrer and are not before the court.

The case was continued a number of times and a day certain was fixed for the trial at the succeeding term of court. The defendant failed to appear by counsel or otherwise at the term in which the trial was had, and the trial judge caused a plea of not guilty to be entered for it, impaneled a jury, and submitted the case to the jury upon evidence and a charge which are not in the record. The jury returned a verdict of guilty, and upon motion of the State the court entered judgment upon the verdict to the effect that the defendant pay a fine of \$50 and costs.

There was no motion for a new trial or in arrest of judgment, and there is no bill of exceptions.

The defendant makes but one assignment in this court, which is as follows:

"The court erred in proceeding to trial of the cause, upon plea of not guilty entered by the court, without notice and knowledge and consent of the defendant, in the absence of defendant or defendant's counsel, and the verdict and judgment thereon are therefore void."

It is insisted for defendant that section 9 of article 1 of the State Constitution controls this case. This section is as follows:

"Right of the Accused in Criminal Prosecutions.—That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof, to meet the witnesses face to face, to have compulsory process for obtaining wit-

Lebanon & Big Spring Turnpike Co. v. State.

nesses in his favor, and in prosecution by indictment or presentment, a speedy public trial, by an impartial jury of the county [“county or district,” in Const. of 1796 and 1834, *Armstrong v. State*, 1 Cold., 338, 342] in which the crime shall have been committed, and shall not be compelled to give evidence against himself.”

The Code provides, at section 7173, Thompson’s Shannon’s Code, that “If the defendant refuses or neglects to plead, or stands mute, the court shall cause the plea of not guilty to be entered and proceed with the trial as if the defendant had put in the plea.”

It is argued that this section of the Code, properly construed, means that the defendant must be present and refuse to plead. It is said that this is the only construction which can be given it, so as to harmonize with the section of the Constitution quoted.

It has been held by this court that the words “criminal charge,” found in sections 6 and 14 of article 1. of the Constitution, refer only to prosecutions of the grade of felony. *McGinnis v. State*, 9 Humph., 43, 49 Am. Dec., 697; *State v. Sexton*, 121 Tenn., 35, 114 S. W., 494; *Witt v. State*, 5 Cold., 11; *Andrews v. State*, 2 Sneed, 551; Cooley on Constitutional Limitations (7 Ed.), 452.

No question is made upon the execution of process against defendant, or its voluntary entrance of its appearance of demurring and applying for a continuance of the case. We think no question could be properly made, and therefore defendant was properly before the court. It did not plead, and if the court was not authorized to enter a plea of not guilty for it, it could have obstructed the trial entirely. Its presence in court

Lebanon & Big Spring Turnpike Co. v. State.

was not necessary to the jurisdiction of the court. Only a fine was imposed against it, and no corporal punishment could have been administered, because it is a corporation.

We are also of opinion that the section of the Constitution quoted has no application to this case. Its only application must be held to be to appearance of the defendant in criminal charges of the grade of felony. See the cases cited above.

There is no error in the judgment of the court below, and it is therefore affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE
WESTERN DIVISION.

COLE-McINTYRE-NORFLEET Co. v. HOLLOWAY.

(*Jackson*. April Term, 1919.)

1. **CUSTOMS AND USAGES.** Course of trade of certain dealers, not amounting to custom, insufficient to bind defendant.
In an action for failure to deliver meal purchased, the seller denying that it accepted the tentative contract made by its agent, the proof that some jobbers in the seller's city uniformly filled such orders, unless the buyer was notified to the contrary, not amounting to a custom, held valueless to make a case for plaintiff buyer. (*Post*, pp. 681, 682.)
2. **SALES.** Unreasonable delay in rejecting solicited order amounts to acceptance.

Where order for meal was solicited by wholesaler's drummer, wholesaler's delay for sixty days after order was taken in notifying the customer that it had not confirmed or accepted the order as required held to be unreasonable, and to effect an acceptance of the order. (*Post*, pp. 682-685.)

Cases cited and approved: *Williams v. Storm*, 46 Tenn., 207; *Blue Grass Cordage Co. v. Luthy*, 98 Ky., 583; *L. A. Becker Co. v. Alvey*, 86 S. W., 974.

RESPONSE TO PETITION TO REHEAR.

3. **CONTRACTS.** Assent to offer may be either express or implied. Though an assent to an offer is requisite to the formation of a

Cole-McIntyre-Norfleet Co. v. Holloway.

contract or agreement, such assent is a condition of mind, and may be either expressed or merely evidenced by circumstances. (*Post*, p. 685.)

4. SALES. Unreasonable delay in rejecting solicited order amounts to acceptance.

Although orders solicited by drummers for wholesaler are not binding until accepted by wholesaler, yet, if wholesaler wishes to reject such an order, he should, especially in case of orders for perishable articles and articles consumable in the use, notify the customer within a reasonable time that the order is not accepted, and if, with ample opportunity, he fails to do so, silence for an unreasonable length of time will amount to acceptance, if the customer is relying on him for the goods. (*Post*, p. 685.)

Case cited and approved: *Hartford et al. v. Jackson*, 24 Conn., 514.

FROM SHELBY.

Error to the Circuit Court of Shelby County.—Hon. J. P. YOUNG, Judge.

D. B. SWEENEY, for plaintiff in error.

P. J. LYONS and JNO. E. BELL, for defendant in error.

MR. CHIEF JUSTICE LANSDEN delivered the opinion of the Court.

This case presents a question of law, which, so far as we are advised, has not been decided by this court in its exact phases. March 26, 1917, a traveling salesman of plaintiff in error solicited and received from defendant in error, at his country store in Shelby county, Tenn., an order for certain goods, which he was authorized to sell. Among these goods were fifty barrels of meal. The meal was to be ordered out by defendant

Cole-McIntyre-Norfleet Co. v. Holloway.

by the 31st day of July, and afterwards five cents per barrel per month was to be charged him for storage.

After the order was given, the defendant heard nothing from it until the 26th of May, 1917, when he was in the place of business of plaintiff in error, and told it to begin shipment of the meal on his contract. He was informed by plaintiff in error that it did not accept the order of March 26, and for that reason the defendant had no contract for meal.

The defendant in error never received confirmation or rejection from plaintiff in error, or other refusal to fill the order. The same traveling salesman of plaintiff in error called on defendant as often as once each week, and this order was not mentioned to defendant, either by him or by his principals, in any way. Between the day of the order and the 26th of May, the day of its alleged rejection, prices on all of the articles in the contract greatly advanced. All of the goods advanced about fifty per cent. in value.

Some jobbers at Memphis received orders from their drummers, and filled the orders or notified the purchaser that the orders were rejected; but this method was not followed by plaintiff in error.

The contract provided that it was not binding until accepted by the seller at its office in Memphis, and that the salesman had no authority to sign the contract for either the seller or buyer. It was further stipulated that the order should not be subject to countermand.

It will be observed that plaintiff in error was silent upon both the acceptance and rejection of the contract. It sent forth its salesman to solicit this and other orders. The defendant in error did not have the right

Cole-McIntyre-Norfleet Co. v. Holloway.

to counterman orders and the contract was closed, if and when it was accepted by plaintiff in error. The proof that some jobbers in Memphis uniformly filled such orders unless the purchaser was notified to the contrary is of no value because it does not amount to a custom.

The case, therefore, must be decided upon its facts. The circuit court and the court of civil appeals were both of opinion that the contract was completed because of the lapse of time before plaintiff in error rejected it. The time intervening between the giving of the order by defendant and its alleged repudiation by plaintiff in error was about sixty days. Weekly opportunities were afforded the salesman of plaintiff in error to notify the defendant in error of the rejection of the contract, and, of course, daily occasions were afforded plaintiff in error to notify him by mail or wire. The defendant believed the contract was in force on the 26th of May, because he directed plaintiff in error to begin shipment of the meal on that day. Such shipments were to have been completed by July 31st, or defendant to pay storage charges. From this evidence the circuit court found as an inference of fact that plaintiff in error had not acted within a reasonable time, and therefore its silence would be construed as an acceptance of the contract. The question of whether the delay of plaintiff in error was reasonable or unreasonable was one of fact, and the circuit court was justified from the evidence in finding that the delay was unreasonable. Hence the case, as it comes to us, is whether delay upon the part of plaintiff in error for an unreasonable time in notifying the defendant in error of its action upon the contract is an acceptance of its terms.

Cole-McIntyre-Norfleet Co. v. Holloway.

We think such delay was unreasonable, and effected an acceptance of the contract. It should not be forgotten that this is not the case of an agent exceeding his authority, or acting without authority. Even in such cases the principal must accept or reject the benefits of the contract promptly and within a reasonable time. *Williams v. Storm*, 6 Cold., 207.

Plaintiff's agent in this case was authorized to do precisely that which he did do, both as to time and substance. The only thing which was left open by the contract was the acceptance or rejection of its terms by plaintiff in error. It will not do to say that a seller of goods like these could wait indefinitely to decide whether or not he will accept the offer of the proposed buyer. This was all done in the usual course of business, and the articles embraced within the contract were consumable in the use, and some of them would become unfitted for the market within a short time.

It is undoubtedly true that an offer to buy or sell is not binding until its acceptance is communicated to the other party. The acceptance, however, of such an offer may be communicated by the other party either by a formal acceptance, or acts amounting to an acceptance. Delay in communicating action as to the acceptance may amount to an acceptance itself. When the subject of a contract, either in its nature or by virtue of conditions of the market, will become unmarketably by delay, delay in notifying the other party of his decision will amount to an acceptance by the offerer. Otherwise, the offerer could place his goods upon the market, and solicit orders, and yet hold the other party to the contract, while

Cole-McIntyre-Norfleet Co. v. Holloway.

he reserves time to himself to see if the contract will be profitable.

Writ denied.

RESPONSE TO PETITION TO REHEAR.

An earnest petition to rehear has been filed, and we have re-examined the question with great care. The petition quotes the text of 13 Corpus Juris. p. 276, as follows:

"An offer made to another, either orally or in writing, cannot be turned into an agreement because the person to whom it is made or sent makes no reply, even though the offer states that silence will be taken as consent, for the offerer cannot prescribe conditions of rejection, so as to turn silence on the part of the offeree into acceptance."

And further: "In like manner mere delay in accepting or rejecting an offer cannot make an agreement."

It is also said that diligent search reveals only one case holding in accord with the court's decision of this case, and that case is *Blue Grass Cordage Co. v. Luthy*, 98 Ky., 583, 33 S. W., 835, and it is said this case was overruled by the later case of *L. A. Becker Co. v. Alvey*, 86 S. W., 974, 27 Ky. Law. Rep., 832. We have examined both of those cases, and we do not think either is authority on the question at issue. In the first case the contract was admittedly executed, and the suit was for damages for its breach. The second case does not refer to the first, and is upon another branch of contracts. The quotation from Corpus Juris contemplates the case of an original offer, unaccompanied by

Cole-McIntyre-Norfleet Co. v. Holloway.

other circumstances, and does not apply to this case, where the parties had been dealing with each other before the contract, and were dealing in due course at the time.

It is a general principle of the law of contracts that, while an assent to an offer is requisite to the formation of an agreement, yet such assent is a condition of the mind, and may be either express or evidenced by circumstances from which the assent may be inferred. *Hartford et al. v. Jackson*, 24 Conn., 514, 63 Am. Dec., 177; 6 Ruling Case Law, 605; 13 Corpus Juris, 276; 9 Cyc., 258. And see the cases cited in the notes of these authorities. They all agree that acceptance of an offer may be inferred from silence. This is only where the circumstances surrounding the parties afford a basis from which an inference may be drawn from silence. There must be the right and the duty to speak, before the failure to do so can prevent a person from afterwards setting up the truth. We think it is the duty of a wholesale merchant, who sends out his drummers to solicit orders for perishable articles, and articles consumable in the use, to notify his customers within a reasonable time that the orders are not accepted; and if he fails to do so, and the proof shows that he had ample opportunity, silence for an unreasonable length of time will amount to an acceptance, if the offerer is relying upon him for the goods.

The motion to rehear is denied.

Bejach v. Colby.

L. D. BEJACH v. HENRY R. COLBY *et ux.*

(Jackson, April Term, 1919.)

1. APPEAL AND ERROR. Excluded deposition to be reviewed must be made part of record.

To enable the Supreme Court to review the alleged improper exclusion of an answer to an interrogatory in a witness' deposition, it is necessary that the deposition be made part of the record by a bill of exceptions. (*Post*, pp. 690, 691.)

2. MUNICIPAL CORPORATIONS. Plaintiff cannot recover for death of his decedent contributorily negligent.

If plaintiff's decedent, killed in an automobile collision, was guilty of negligence proximately contributing to the accident, plaintiff cannot recover for the death unless otherwise provided by statute. (*Post*, p. 691.)

3. NEGLIGENCE. Any contributory negligence of plaintiff will bar recovery.

Any negligence on the part of plaintiff contributing directly to the injury will bar an action. (*Post*, p. 691.)

Case cited and approved: Railroad v. Pugh, 97 Tenn., 624.

4. NEGLIGENCE. Remote contributory negligence constitutes mitigation, but no bar.

Where negligence by plaintiff is remotely connected with the cause of injury, the question to be determined is whether defendant exercising ordinary care and skill might have avoided the injury, and, if so, plaintiff's remote negligence may not be set up in bar of the action, but will be considered only in mitigation. (*Post*, p. 691.)

Cases cited and approved: Dush v. Fitzhugh, 70 Tenn., 307; Railroad v. Pugh, 97 Tenn., 624; Nashville R. Co. v. Norman, 108 Tenn., 324; Memphis St. Ry. Co. v. Haynes, 112 Tenn., 712; Railroad v. Hull, 88 Tenn., 33; Railroad Co. v. Fleming, 82 Tenn., 128.

Bejach v. Colby.

Case cited and distinguished: Chattanooga Station Co. v. Harper,
138 Tenn., 562.

5. **MUNICIPAL CORPORATIONS.** Instruction as to contributory negligence in automobile accident misleading.

In an action for death of plaintiff's decedent in an automobile collision, an instruction that, if such decedent was guilty of gross contributory negligence, there could be no recovery, regardless of whether or not it was one of the proximate causes of the accident, held misleading. (*Post*, pp. 693, 694.)

FROM SHELBY.

Appeal from the Circuit Court of Shelby County to the Court of Civil Appeals, and by *certiorari* to the Court of Civil Appeals from the Supreme Court.—HON. BEN L. CAPELL, Judge.

BOYD & BEJACH, for plaintiff.

WILSON & ARMSTRONG, for defendants.

MR. JUSTICE HALL delivered the opinion of the Court.

An action of damages instituted in the circuit court of Shelby county by the plaintiff in error as the executor of Samuel Bejach, deceased, against the defendants in error to recover for the alleged negligent killing of his said testate.

There was a trial in the court below before the circuit judge and a jury, which resulted in verdict and judgment for the defendants in error, from which the plaintiff in error appealed to the court of civil appeals, where the judgment of the court below was affirmed.

Bejach v. Colby.

The plaintiff in error has brought the case to this court by petition for writ of *certiorari* and errors upon the judgment of the court of civil appeals have been assigned.

The plaintiff in error's testate, Samual Bejach, was killed as the result of a collision taking place between his automobile and that of the defendants in error at the intersection of Overton Park avenue and Stonewall street, in the city of Memphis, on July 4, 1917. At the time of the collision Mr. Bejach's car was being driven by John Beasley, his chauffeur, west along Overton Park avenue, which is an east and west thoroughfare. The Colby car was being driven by the defendant in error Mrs. Henry R. Colby north along Stonewall street, which is a north and south thoroughfare.

The plaintiff in error offered evidence tending to show that the Bejach car was being driven west on the north or right-hand side of Overton Park avenue at a rate of speed not exceeding fifteen miles per hour until just before it reached Stonewall street, when the chauffeur slowed it down to about twelve miles per hour; that upon approaching Stonewall street the claxton or horn of the Bejach car was sounded by the chauffeur, who says that before entering into Stonewall street he looked south down that street for a car but did not see one, and proceeded to cross the street, and when near the west side of Stonewall street the car being operated by him was struck by the Colby car, which was moving north on Stonewall street. Beasley testified that he did not see the Colby car approaching until it was within from ten to twenty feet of the Bejach car, that the

Bejach v. Colby.

Colby car was being operated at about forty miles per hour, and that he was unable to get his car out of its way in time to prevent a collision. The Bejach car was struck by the Colby car and was turned over, Mr. Bejach sustaining fatal injuries.

Miss Ora Reed, who testified on behalf of the plaintiff below, stated that she witnessed the collision from an upstairs window of her home, which is situated on the southwest corner of Stonewall street and Overton Park avenue. She testified that she observed the Bejach car before it reached Stonewall street, and she says that said car was moving at the rate of about fifteen miles per hour until just before it reached Stonewall street, when its rate of speed was reduced. She also stated that she could hear the racing of the motor of the Colby car before it came within the line of her vision, which indicated that it was being operated at a high rate of speed; that after it came within her view she says that it was running at the rate of about thirty-five miles per hour, and ran into the Bejach car, which had reached a point near the west side of Stonewall street. According to the testimony of both Beasley and Miss Reed, the Colby car was being operated on the west or left-hand side of Stonewall street at the time of the collision.

Mrs. Colby testified that the car which she was operating belonged to her husband, Henry R. Colby; that she was in the habit of operating it on the streets of Memphis, and at the time of the accident was operating it north along Stonewall street at a rate of speed of from eighteen to twenty miles per hour. She stated

Bejach v. Colby.

that she reached the intersection of the two streets first, and was proceeding across Overton Park avenue when the Bejach car, which was approaching from the east on Overton Park avenue, undertook to run in front of her car and was struck by the front end of the car being driven by her. She stated that she observed the Bejach car just before the collision; that it was then very close, and was running at a very high rate of speed, which she estimated at twenty-five miles per hour. She testified that, when she saw that the Bejach car was not going to stop and that a collision was imminent, she stood up on her foot brake and did all within her power to bring her car to a stop, but was unable to do so.

The foregoing is, in substance, the respective contentions of the parties as to how the collision occurred. The testimony presented a sharp issue as to whose negligence brought about the collision, and there was evidence which would have supported a verdict either for or against the plaintiff below.

We might say here that there is no assignment by the plaintiff in error that there is no evidence to support the verdict of the jury. It is assigned as error that the court of civil appeals erred in not holding that the trial judge improperly excluded the answer to interrogatory No. 24 in the deposition of Ralph S. Harris, which it is claimed was offered on behalf of the plaintiff in error. The deposition of Harris was not made a part of the record by bill of exceptions, which was necessary to have this court review the alleged improper exclusion of said testimony.

Bejach v. Colby.

It is next insisted that the court of civil appeals erred in not holding that it was error for the trial judge to give in charge to the jury the following special request offered by the defendants below:

"Gentlemen, a special request has been asked by the defendant, and I state to you that it correctly states the law. If you believe from the evidence that John Beasley was guilty of gross, contributory negligence, then there can be no recovery in this case, regardless of whether or not it was one of the proximate causes of the accident."

We think this assignment of error must be sustained. It is well settled by our decisions that contributory negligence is, when it proximately contributes to the infliction of the injury, a bar to an action, unless otherwise provided by statute. This is true because a person cannot be permitted to rush heedlessly into an apparent danger from which an injury results to him and then recover for such injury brought about by his failure to exercise ordinary care. The rule at common law was, and in this State still is, that any negligence on the part of the plaintiff, which contributes directly to the injury, will bar an action. *Railroad v. Pugh*, 97 Tenn., 624, 37 S. W., 555. *

It is likewise well settled that, in all cases where negligence on the part of the plaintiff is remotely connected with the cause of the injury, the question to be determined is whether the defendant, by the exercise of ordinary care and skill, might have avoided the injury. If he could have done so, the remote and indirect negligence of the plaintiff cannot be set up as an answer to the action. Such negligence will only be considered in

Bejach v. Colby.

mitigation of the damages. *Dush v. Fitzhugh*, 2 Lea, 307; *Railroad v. Pugh*, 97 Tenn., 624, 37 S. W., 555; *Nashville R. Co. v. Norman*, 108 Tenn., 324, 67 S. W., 479; *Memphis Street Railway Co. v. Haynes*, 112 Tenn., 712, 81 S. W., 374; *Railroad v. Hull*, 88 Tenn., 33, 12 S. W., 419; *Railroad Co. v. Fleming*, 14 Lea, 128.

It is insisted by the defendants in error that the giving of the request in charge to the jury was warranted by the holding of this court in the case of *Chattanooga Station Co. v. Harper*, reported in 138 Tenn., 562, 199 S. W., 394. In that case the court used this language:

"The rule in this State is that when the rights of the parties are to be settled under the statute, which prescribes the precautions that railway companies shall use to prevent collisions on the track, the contributory negligence of the person injured can only be taken in mitigation of damages. On the other hand, when the rights of the parties are to be settled by the common law, the rule is that where the negligence of the party injured contributed proximately to his own injury, either alone, or, generally speaking, in conjunction with the railway company, there can be no recovery; but in case the negligence of the railway was the proximate cause of the injury, and that of the person injured contributed only remotely, then the contributory negligence can be used only in mitigation; but otherwise if the negligence of the party injured was gross, although, in the absence of such degree of negligence on his part, that of the railway company would be treated as the proximate cause."

Bejach v. Colby.

We think the court, in using the foregoing language, had reference to proximate contributory negligence. We do not think that it was intended by the language used to lay down the rule that negligence on the part of the plaintiff, if gross, would bar his right to recover though it did not directly produce the injury or contribute to it. If such is the meaning of the language used by the learned judge who wrote the opinion in that case, it does not state the correct rule, because, in all cases, before the plaintiff's negligence can be held to bar a recovery it must appear that such negligence directly contributed to bring about the injury. This is the test of the plaintiff's right to recover in all cases involving contributory negligence.

We think the request given by the trial judge in the case under consideration was misleading to the jury and prejudicial to the plaintiff in error. If the plaintiff were guilty of negligence which directly and proximately contributed to bring about the injury, it would make no difference whether that negligence was slight or gross, he could not recover. If, however, such negligence did not directly contribute to bring about the injury, the plaintiff can recover; the degree of negligence being immaterial, except in so far as it goes in mitigation of the damages.

The remaining assignments of error need not be discussed in this opinion. We have carefully examined them, and find that none of them are well taken.

For the error indicated, the judgment of both the court of civil appeals and the circuit court will be re-

Bejach v. Colby.

versed, and the case will be remanded for a new trial not inconsistent with this opinion.

The costs incident to the appeal to the court of civil appeals and the filing of the petition for writ of *certiorari* will be taxed against the defendants in error.

Dodson v. Polk.

CLAUDE A. DODSON *et al.* v. S. F. POLK.

(*Jackson*. April Term, 1919.)

1. **WILLS.** Devise on life estate with remainder to life tenant's children.

A codicil, considered with the will, held to devise a life estate only, with the remainder to life tenant's children. (*Post*, pp. 699, 700.)

2. **WILLS.** Decree construing will not contradicted by decree vesting donee with fee to land.

A decree, passed for construction of a will, and ordering an allotment of testator's lands, and correctly adjudging that D. took only a life estate, with remainder to his children, and a subsequent decree after allotment by commissioners of land to D., that all right of all the donees and heirs of testator, except D., in and to the land assigned by commissioners to D., be divested out of them and vested in D., "his heirs and assigns forever," held not to vest D. with the fee, the latter decree being consistent with former. (*Post*, pp. 699, 700.)

FROM PERRY.

Appeal from the Chancery Court of Perry County.—
Hon. J. W. Ross, Chancellor.

Jno. T. PEELER, for appellants.

Jno. A. GREER and Geo. W. PEARSON, for appellee.

Dodson v. Polk.

MR. CHIEF JUSTICE LANSDEN delivered the opinion of the Court.

This is an action of ejectment. The complainants derive their title from their father, John M. Dodson, now deceased. The defendant claims as purchaser of the lands at a judicial sale in the name of Dodson. The questions made arise upon the construction of the last will and testament of J. L. Webb, deceased, and the effect upon the title of Dodson of two certain decrees passed in the chancery court of Perry county.

John M. Dodson, common source of title, was the great-grandfather of J. L. Webb. Webb executed a will which contained the following clauses:

"At the death of my wife, or at her marriage, I will, devise, and bequeath all my property, both real and personal, be equally divided between my three children, Nancy J. Guthrie, W. C. Webb, and John M. Webb. My daughter Nancy's part or portion to be to her sole and separate use and behest. Free from the debts, contracts, and liabilities of her present husband (or any future husband she may have), and at her death her children shall enjoy her estate. My two sons are to take a life estate in their part or portion of property only, and at their deaths their children shall have and enjoy such estate as each one of my sons take in my property respectively; and if either one or more of my said children die leaving minor children, then and in that event it is my desire that a guardian be appointed, and the guardian or such guardians shall have power and authority to nominate and appoint three commissioners to divide the property both real

Dodson v. Polk.

and personal, and to make deeds of conveyance to the land, to which said minors may be entitled to."

This will was witnessed on the 2d of February 1873.

On November 26, 1879, testator added a codicil to the will, which, in so far as it bears upon this controversy, is as follows:

"I devise unto my daughter, Nancy J. Guthrie, and her heirs my domicile or homestead, with so much land annexed thereto as will be necessary to make her equal with my sons, Wm. C. and John M. Webb, to be disposed of as set forth in my last will, then the remainder of said home place to be equally divided between my heirs as devised in my last will."

On December 18, 1883, testator added the following codicil:

"I, John L. Webb, of the county of Perry and State of Tennessee, do make this my codicil, hereby confirming my last will made on the 2d day of February, 1873, and my codicil made on the 26th day of November, 1879, excepting so far as the disposition of my property is changed by this codicil I devise unto my grandsons John M. Dodson and James Mack Guthrie the part heretofore devised to my daughter, Nancy J. Guthrie, as follows, to wit: I devise unto John M. Dodson during his life my domicile or homestead, with as much land as will be necessary to make his part equal with James Mack Guthrie, to whom I devise during his life the place on which his father, R. A. Guthrie, now resides, known as the Pace farm, near the mouth of Sinking creek, on Buffalo river; and, after the death of either of my grandsons above named, I devise the parts herein set forth to them, to their children; but if they should die

Dodson v. Polk.

without issue, then to go back to my heirs; then the remainder of said home place to be divided between my heirs equally as devised in my last will."

John M. Dodson and James Mack Guthrie are sons of Nancy J. Guthrie. The complainants are children of John M. Dodson.

In all of the testator's will it seems to have been his idea to vest his children with life estates only. In the third item of the will he bequeathed to Elizabeth and Mary Webb five hundred dollars each, to be invested by his executors in land, in "which land they are to enjoy a life interest only," and provides that the remainder is to go to their children, if any. In the original will it is conceded that Nancy J. Guthrie was given only a life estate. In the first codicil the estate of Nancy J. is not affected. In the second codicil the devise is to Mack Guthrie and John M. Dodson, the father of complainants, and his interest is expressly limited to "during his life." Nowhere in the will are to be found words of an indefeasible estate beyond the natural life of John M. Dodson. This construction is in harmony with the testator's will throughout. He did not devise to any of his children a fee-simple estate.

The will was thus understood by the chancellor, who, in a suit by the executors to construe the will, decreed as follows:

"And the defendants James Mack Guthrie and John M. Dodson are vested by said will with a life estate in the lands respectively devised to them by the second codicil to said will, with remainder interest to their children which may survive them, if any, and, if no children survive them, then at their death to the heirs

Dodson v. Polk.

at law of testator, John L. Webb, in fee; and that the personality bequeathed by said will becomes and is thereby vested absolutely in the legatees the said W. C. Webb, J. M. Webb, James Mack Guthrie, and John M. Dodson."

There was no exception to this decree upon the part of any one. Later there were commissioners to allot the testator's land, and the tract in controversy was allotted to John M. Dodson. The decree of the chancellor in respect to this matter is as follows:

"And that all right, title, interest, and claim of all the devisees and heirs at law of J. L. Webb, deceased, except defendant J. M. Dodson, in and to the portion of lot number 3, of seventy-three acres, and the northern half of the seventy-six-acre tract described in said report, and herein assigned by said commissioners to defendant John M. Dodson, be divested out of them, and vested in the said John M. Dodson, his heirs and assigns, forever."

The contention of defendant is that the second codicil, together with the foregoing decree of the chancellor, have vested Dodson with an estate in fee to the land. The reply of the complainants is that the portion of the decree which undertook to vest Dodson with an estate in fee is *coram non judice*. We think the last decree should be understood in connection with the first decree. The first decree was passed for the purpose of construing the will and ordering an allotment of the lands. This decree correctly adjudged that Dodson was given a life estate only by the testator. The last decree merely divests out of the devisees and heirs at law of the testator all right, title, interest and claim

Dodson v. Polk.

they may have in this tract of land, and vest the same in Dodson, "his heirs and assigns forever." It is not decreed that Dodson is the owner in fee of the land, but it is only adjudged that such interest as other heirs and devisees may have had in this tract be vested in Dodson, "his heirs and assigns forever." This cannot be held to be a contradiction of that part of the decree which expressly construes the will and adjudges the rights of the parties. In that decree it was settled that Dodson was the owner by the will of an estate for life only. That was an exhaustion of the powers of the court in construing the will, unless the decree was set aside and expugnated by the chancellor. There is no real inconsistency between the two decrees.

We are of opinion that the meaning of the will is of easy solution and is quite clear. The testator intended that these complainants should be vested with the remainder estate after the death of their father.

The chancellor dismissed the bill upon the demurrer, and we reverse his decree, and remand the case for proof and trial.

INDEX

ACCORD AND SATISFACTION

Rescission. Return of moneys received.

Where insured accepted less than the amount due as accord and satisfaction, and the insurer in his action set up such accord and satisfaction, which the insured alleged was obtained by fraud, the return of the money received was not prerequisite to recovery of the true amount due, since in any event the insurer was liable for more than it had paid. *Conrad v. Interstate Life & Accident Ins. Co.*, 14.

ADVERSE POSSESSION.

Color of title. Void tax deed.

A tax deed under which defendants claimed the land in suit, even if void, constituted color of title in them. *Moffat v. Schenck*, 305.

See TENANCY IN COMMON.

AGENCY.

See INSURANCE.

ANIMALS.

1. Statutes. Classification of counties. Registering dogs.

Priv. Laws 1917, chapter 648, section 1, declaring a public nuisance the running at large of dogs not registered, in counties having a population between 29,946 and 29,975, according to the 1910 federal census, is not unconstitutional as partial; counties being properly subjected to the population classification basis. *Ponder v. State*, 481.

2. Dogs. Registration. Penalty.

Under Priv. Laws 1917, chapter 648, requiring registration of dogs, it is no defense to an indictment for keeping and permitting a dog to run at large in September without first having been registered, which is a misdemeanor under section 6, that the tax is not delinquent under section 12 until October 1st, since the latter section requires registration by July 1st. *Ib.*

APPEAL AND ERROR.

APPEAL AND ERROR.**1. Insufficient proof.**

Where both parties appealed from the judgment, and the transcript did not contain the amended record, which the judgment referred to, and which would have justified a larger recovery, the cause will be remanded for the taking of further proof to establish proper amount of recovery. *Whaley v. King*, 1.

2. Review. Intermediate courts. Failure to appeal.

Where a question was decided adversely to the defendant in error by the court of civil appeals, he is bound thereby, where he has not brought the case to the supreme court by certiorari. *Southern Ry. Co. v. Williams*, 46.

3. Right to appeal. Inquisition. "Person interested." Aggrieved person.

A brother of a thirty-seven year old bachelor was not, by reason of his contingent expectancy of inheritance, a "person interested," nor an "aggrieved person," who could, under Thompson's Shannon's Code, sections 4879, 4880, appeal from a judgment after an inquisition finding that his brother was not of unsound mind. *Harmon v. Harmon*, 64.

4. Preservation of defenses. Federal Employers' Liability Act. Special damages.

The objection that the administrator of a deceased minor servant, in his action under the federal Employers' Liability Act for damages for the negligence of a fellow servant, failed to allege pecuniary loss must be raised at the trial. *Roberts v. Southern Ry. Co.*, 95.

5. Objection not raised below.

Question as to whether, in bill to settle estate in chancery, clerk of county court can petition to collect inheritance tax, cannot be first raised on appeal. *Tate v. Greenlee*, 103.

6. Jurisdiction of subject-matter. Objections.

The question of jurisdiction of the subject-matter can be raised at any time in any court, and may be considered by the supreme court on appeal. *In re Lumber & Mfg. Co.*, 325.

7. Change of. Theory on appeal.

Where plaintiff was injured when she stumbled over lumber placed on a railroad right of way in such a manner that it obstructed an established path thereon, held that, where plaintiff relied on a prescriptive way, she could not on appeal change to the theory that a landowner, who expressly or by implication, invites the public to come upon his land or use it as a pathway, cannot permit a

APPEAL AND ERROR—ASSIGNMENT.

APPEAL AND ERROR—Continued.

snare or danger to exist thereon which results in injury to the person who accepts the invitation. *C. N. O. & T. P. Ry. Co. v. Sharp*, 146.

8. Review. Law of case.

A former judgment against an unincorporated religious association held on subsequent appeal conclusive as to the authority of the association to incur the indebtedness sued for. *Hunter v. Swadley*, 156. —

9. Review. Damages. Concurrence of the lower courts.

Where there is a concurrence of the two lower courts as to the amount of damages in a condemnation proceeding, the supreme court will not interfere except under very unusual circumstances. *Southern Ry. Co. v. Pouder*, 197.

10. Review. Intermediate courts. Extent.

It is the duty of the supreme court to ascertain if there are any errors in action of court of civil appeals and to correct such errors, but not to go over the entire record and decide the case as a new controversy. *Heggie v. Hayes*, 219.

11. Moot question. Bill to remove sheriff. Expiration of term. Costs. Statutes.

Under the Ouster Act, appeal from decree dismissing bill to remove sheriff will be dismissed, where sheriff's term expires pending appeal, particularly in view of Acts 1917, ch. 107, giving presiding judge discretion over costs. *State ex rel. v. Bush*, 229.

12. Excluded deposition to be reviewed must be made part of record.

To enable the Supreme Court to review the alleged improper exclusion of an answer to an interrogatory in a witness' deposition, it is necessary that the deposition be made part of the record by a bill of exceptions. *Bejach v. Colby*, 686.

See CRIMINAL LAW.

ASSIGNMENT.**Conveyance of expectant estate.**

An agreement or covenant to convey by an heir expectant and *sui juris*, if fairly made and based on a valuable consideration, will be enforced as against the grantor and privies, whenever the property comes into his possession, but not until then. *Tate v. Greenlee*, 103. —

BANKRUPTCY—BILLS AND NOTES.

BANKRUPTCY.**1. Actions by trustee. Set-off and counterclaim. "Mutual credits and debts."**

Where corporation purchased its own stock and became bankrupt, its trustee having brought suit to recover the amount paid the stockholder, the latter could not set off against the recovery an indebtedness of the corporation to him, since he received the money for the stock as a trustee for the creditors; the capital stock being a trust fund, and the case not being one of mutual credits and debts within the meaning of the bankruptcy act. *Whaley v. King*, 1.

2. Construction of Bankruptcy Act.

In an action in State court by a trustee in bankruptcy involving the construction of the Bankruptcy Act, the decisions of the United States supreme court are controlling. *Whaley v. King*, 1.

BILLS AND NOTES.**1. Payment or purchase of note.**

Where a company unable to pay its notes upon which stockholders were indorsers executed to a bank a note payable in four months for the exact amount advanced by the bank to take up said two prior overdue notes, which were not to be canceled or stamped paid but attached as collateral for the money advanced, *held*, the bank became a purchaser and owner of the overdue notes, and that there was no payment thereof. *Hunter v. Matt Stewart Co.*, 507.

2. Indorsers. Discharge. Extension of time.

Where a company unable to pay its notes upon which stockholders were indorsers executed to a bank a note payable in four months for the exact amount advanced by the bank to take up said two prior overdue notes, and the overdue notes were not to be canceled or stamped paid, but attached as collateral for the money advanced, *held*, that the rights of the bank against the indorsers were reserved within the Negotiable Instruments Act. *Ib.*

3. Consideration. Collateral security for pre-existing debt. "Value."

Under Negotiable Instruments Law, section 25, providing that an antecedent or pre-existing debt constitutes value, and section 27, providing that a holder who has a lien on the instrument shall be deemed a holder for value to the extent of his lien, a pre-existing debt is "value," even though the instrument is transferred merely as collateral security for such debt. *Crane & Co. v. Hall*, 556.

BROKERS.

BILLS AND NOTES—Continued.**4. Innocent holders. Security for pre-existing debt.**

Where defendant executed a note and mortgage covering land, title to which was taken in his name merely for the convenience of others actually interested, and such note was negotiated contrary to agreement, and came into the hands of plaintiff prior to maturity, without knowledge of any infirmity or defense, plaintiff was an innocent holder in due course, even though the note was taken as security for a pre-existing debt owing by the person who negotiated it in view of Negotiable Instruments Law, sections 25, 27. *Ib.*

BROKERS.**1. Authority to sell. Authority to contract to sell or make option agreement. "Sale."**

An exclusive agency contract construed as authorizing a "sale," i. e., the finding of a purchaser and the consummation of a deal, and not to authorize a contract to sell or an option agreement for sale of the land. *McFadden v. Crisler*, 531.

2. Real estate brokers. Specific authority. Knowledge of purchaser. Construction of agency contract.

The agent's authority to sell real estate must be specific, and is generally closely construed, and the purchaser must know that the seller is acting as agent, and not as principal, and must become aware of the agent's authority; and, where limited to sale at a fixed price per acre, the purchaser must know that the agent is without authority to make contract for sale, particularly one giving purchaser an unreasonable time to consummate the deal. *Ib.*

3. Exclusive agency. Right of owner to sell. Sale as revoking agency.

Where a farm was deeded to trustees who issued certificates to each of the owners showing the amount and part each paid, and they gave an exclusive agency contract to sell the land, and subsequently conveyed all the certificates to other parties, such transfer constituted a sale and revoked the agency, there being no stipulation against sale by the owners, since it is never presumed an owner has deprived himself of the right to sell. *Ib.*

4. Authority. Cash sale. Sale on time not compliance.

An agency contract to sell land at a fixed price means a cash sale, where the contrary is not stated and does not authorize a contract for sale giving the buyer ten months in which to pay for the land or forfeit earnest money. *Ib.*

CARRIERS.

CARRIERS.**1. Passengers. Assisting passenger to alight.**

Where passenger is old or infirm, or place of alighting from train is dangerous, or there are other circumstances indicating need of assistance, carrier is bound to exercise highest degree of care in assisting passenger to alight; but where place is safe, and there is nothing to indicate help is needed, carrier need not render assistance. *Nashville Ry. v. Newsome*, 8.

2. Passengers. Voluntary assistance to passengers in alighting.

Carrier's employees, who volunteer assistance to passenger in boarding or alighting, although assistance is unnecessary, are bound to exercise reasonable care in so doing, but are not held to highest degree of care. *Ib.*

3. Passengers. When relation ceases.

Where the passenger steps from the car to the street, with intention of resuming his journey immediately on foot or by means other than the car, the relation of a carrier and passenger ceases. *Sims v. Knoxville Ry. & Light Co.*, 238.

4. Treatment of passengers. Contract.

A passenger upon a street railway car is entitled on his journey to civil treatment from defendant's servants in charge of the car as a part of the contract of carriage. *Ib.*

5. Passengers. Termination of relation. Tort of servant.

Where a passenger upon a street railroad car felt that he had been mistreated by the conductor after alighting from the front of the car according to a rule of the company, necessarily passed to the rear to get the number of the conductor to make his complaint, and while doing so, was assaulted by the conductor and injured, the company was liable. *Ib.*

6. Contributory negligence. Presumption. Jury question.

Where plaintiff's deceased was killed on a cloudy misty morning by a street car, nobody seeing accident, presumption that deceased exercised due care was rebuttable, and court erred in refusing to submit contributory negligence to jury. *Memphis St. Ry. Co. v. Carroll*, 265.

7. Property. Liens. Constitutionality of statute.

Shannon's Code, section 1530, providing that no lien created by railroad on its property shall be valid against judgments for damages to persons and property in the operation of its railroad is valid. *In re Walker*, 281.

CARRIERS.

CARRIERS—Continued.**8. Receivers. Authority of court. Liens.**

Court operating railroads under direction of receiver cannot create a priority of lien forbidden by the statutes. *Ib.*

9. Property. Liens. Construction of statute.

Shannon's Code, section 1530, preventing railroad company from creating mortgage or lien to be valid as against specified claims, does not create a lien in favor of those coming within its provisions, but operates to postpone liens created by railroad company to the satisfaction of claims of the preferred class. *Ib.*

10. Receivers. Authority of court.

Generally court may order or authorize receiver to do any acts in regard to the preservation or operation of a railroad which are within the corporate powers of the company, but the receiver cannot exercise, nor can the court authorize him to exercise, any powers or franchises beyond those of the company to whose possession he succeeds. *Ib.*

11. Judgment for personal injuries. Receiver's certificates. Priority.

Under Shannon's Code, section 1530, judgment recovered against receiver of railroad for death from negligence in operation of road held prior to receiver's certificates; the receiver standing in no more favored position as to priority of incumbrance against such judgment than the railroad. *Ib.*

12. Carriage of freight. Injury. Damages. Overhead expenses.

In an action against a carrier for damage to an asphalt plant transported by it and wrecked in transit, no recovery could be had for overhead expenses due to the enforced idleness of plaintiff's workmen, such item of damages not being in contemplation of the parties. *West Const. Co. v. Seaboard Ry. Co.*, 342.

13. Carriage of goods. Contract for transportation. Waiver.

Where a shipper under protest pays a higher rate than called for by the contract under which material is shipped, in order to obtain the material which he needed, such payment is not a waiver of the contract. *Ib.*

14. Carriage of freight. Contract as to rate. Validity.

Where a railroad company inspects and classifies as pitch material which is claimed to be asphaltum, and enters into a contract with a shipper to transport it for a given sum, the contract is binding, notwithstanding that the rate charged is less than the authorized tariff rate, in the absence of a showing of mistake. *Ib.*

CLERKS OF COURTS—CONSTITUTIONAL LAW.

CARRIERS—Continued.**15. Action for damage to goods. Interest on amount of recovery.**

In an action against a carrier for damages to an asphalt plant in transit, it was within the discretion of the chancellor to allow interest on cost of repairs paid by complainant, recovery of which was sought from carrier. *West Const. Co. v. Seaboard Ry. Co.*, 342.

16. Governmental agencies.

Under Act Cong. March 21, 1918 (U. S. Comp. St. 1918, sections 3115½a-3115½p), and under previous statutes and a proclamation of the President, the railroads of the country are merely agencies or instrumentalities of the United States government. *Ib.*

CLERKS OF COURTS.**1. Registers of deeds. Sheriffs and constables "throughout the state." Fees. Statutes.**

Acts 1917, chapter 47, providing that clerks of court, masters in chancery, county trustees, registers or deeds, and sheriffs throughout the State shall be deprived of their fees and compensated only by salary as hereinafter provided, must be construed as depriving such officers of their fees in counties of less than 30,000 population, though salary for such officers was not thereinafter provided. *Hickman v. Wright*, 412.

2. Constitutional law. Counties. Registers of deeds. Sheriffs and constables. Fees. Due process of law. Class legislation.

Acts 1917, chapter 47, depriving clerks of courts, sheriffs, registers of deeds, masters in chancery, and county trustees throughout the State of fees, and providing salaries for only a part of them, is unconstitutional, as depriving part of such officers of compensation, contrary to "the law of the land," and as "class legislation" (Const. article 1, section 8, and article 11, section 8). *Ib.*

CONSTITUTIONAL LAW.**1. Due process. Attachment.**

Where debtor's wages were attached and impounded in another State, and judgment rendered against him, without actual or constructive service in accordance with the laws of that State, the court acquired jurisdiction, and defendant was not denied due process of law, under Constitution U. S. Amendment 14, section 1. *Southern Ry. Co. v. Williams*, 46.

CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW—Continued.**2. Due process. Service on manager of partnership.**

Thompson-Shannon Code, section 4542, is so far as it authorizes service upon a nonresident partnership, composed of nonresident partners, by delivery of summons to its local manager or agent within the state, is in violation of Constitution, U. S. Amend. 14, section 1, relating to due process at law. *Knox Bros. v. Wagner & Co.*, 348.

3. Taxation. Additional privilege tax. Foreign corporation. Impairing obligation of contract.

Acts 1900, chapter 504, requiring corporations, which had already entered State and paid for privilege of entering, to pay a privilege tax measured by their capitalization, and to pay difference between sum paid on entering State and amount required by statute, is constitutional. *Mengel Box Co. v. Stevens*, 373.

4. Constitutionality of statute. Presumption.

Every intendment is in favor of the constitutionality of a statute. *Ogilvie v. Hailey*, 392.

5. Statutes. Constitutionality. Presumption.

If any possible reason can be conceived to justify classifications in revenue statutes, they will not be held unconstitutional as discriminatory. *Ib.*

6. Constitutionality of statute. Sufficiency of objection.

Where a bill is bottomed on the unconstitutionality of a statute, it is duty of complaint to point out and state with particularity details of supposed invalidity. *Ib.*

7. Necessity of determining question. Issues.

In a suit to enjoin the collection of a privilege tax on automobiles under Priv. Acts 1915, chapter 407, on ground that such statute was unconstitutional, court need not pass on question as to whether or not penalty provided in section 2 was excessive and vitiated the statute, where no penalty was involved in the suit in question *Ib.*

8. Delegation of legislative power. Imposition of non-judicial duties on judiciary.

In view of Constitution article 11, section 9, legislature, in passing Acts 1917, chapter 47, did not violate Constitution article 2, sections 1, 2, relating to delegation of legislative power and imposition of nonjudicial duties upon judiciary, when it delegated to the courts authority to determine the number of deputies of county officers unable to perform all the duties of the office and the salaries they were to receive. *Hickman v. Wright*, 412.

CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW—Continued.

9. *Discrimination. Registering dogs.*

The requirement of Priv. Laws 1917, chapter 648, that dogs be registered and wear collars bearing tags for identification is reasonable, and the enactment that dogs not so identified are a public nuisance when found running at large, while dogs so identified are permitted to run at large, is not an arbitrary and unreasonable discrimination. *Pouder v. State*, 481.

10. *Licenses. Taxation. Taking property without just compensation. Equality of taxation.*

Priv. Laws 1917, chapter 648, as to registering dogs, does not violate Constitution article 1, section 21, in that it takes property without just compensation being made therefor, nor article 2, section 28, providing that no one species of taxable property shall be taxed higher than any other species of property of the same value. *Ib.*

11. *Judicial power. Legislative invasion.*

A joint resolution of legislature, directing the discharge of a defendant indicted for a crime, is an invasion of the judicial power by the legislature. *State v. Costen*, 539.

12. *Legislative acts. Encroachment. Nolle prosequi.*

Senate Bill No. 141, prohibiting the discharge of indicted defendant, except by acquittal without requiring him to pay, secure or work out in the workhouse all the costs, fees, and penalties, is not unconstitutional by interfering in sections 1 and 4 with judicial discretion and functions of the court in violation of Constitution, article 6, section 1, or in controlling the ministerial acts of the attorney-general and the judges; the judge having no participation in filing of *nolle prosequi* except to give his consent to such order and permit its entry upon the record, and the attorney-general having no constitutional right to file *nolle prosequi*. *Ib.*

13. *Nolle prosequi. Exercise of pardoning power.*

The action of the attorney-general in recommending a *nolle prosequi* upon ground that defendant had served in the army since the filing of the presentment, and had been honorably discharged, and the action of the court in granting the *nolle prosequi* was an attempt to exercise pardoning power, vested in the Governor under Constitution, article 3, section 6. *Ib.*

14. *Illegal classification. Regulation of public utilities.*

The provisions of Acts 1919, chapter 49, that public utilities shall carry for protection of stockholders, etc., a depreciation account,

CONTRACTS.

CONSTITUTIONAL LAW—Continued.

that they shall keep books in a certain manner, and that they shall not issue stocks, etc., without consent of the Railroad Commission, do not render the act invalid on the theory that it arbitrarily classifies public utilities and discriminates against them. *City of Memphis v. Enloe*, 618.

15. *Right to attack constitutionality of act.*

The city of Memphis cannot attack Acts 1919, chapter 49, regulating public utilities, as street railroads, and giving the Railroad Commission jurisdiction over fares, on the ground that the requirement that the public utilities carry for the protection of stockholders a depreciation account, that they keep their books in a certain manner, and that they cannot issue stocks without first obtaining authority from the commission, etc., amounts to an arbitrary and illegal classification; the city not being entitled to complain against such classification of public utilities. *Ib.*

16. *Validity of statute. Persons entitled to question.*

Though Acts 1897, chapter 10, provided that no person owning bonds or stocks of any railroad company should serve as a member of the Railroad Commission, the city of Memphis cannot attack the constitutionality of Acts 1919, chapter 49, extending the regulatory powers of the Railroad Commission to public utilities, as street railroads, on the ground that the subsequent act made no such provision; for the city is not, in a suit to enjoin the commission from hearing an application for increase in rates, interested in such provision. *Ib.*

17. *Arbitrary classification. Regulation of street railroads.*

An act regulating public utilities, as street railroads, is invalid both under the federal and Tennessee constitutions, if it makes an arbitrary and illegal classification. *Ib.*

18. *Obligation of contracts. Street railroad rates.*

Acts 1919, chapter 49, extending the powers of the Railroad Commission to public utilities and allowing the commission to investigate and fix rates, is not invalid as impairing the obligation of contract in violation of Constitution U. S. and Constitution Tenn. article 1, section 20, as to the city of Memphis, which had previously by ordinance fixed the rate which street railroad company doing business therein might charge. *Ib.*

See CLERKS OF COURTS.

CONTRACTS.

1. *Construction. Practical interpretation.*

The rule concerning practical interpretation of the parties themselves only applies in cases where contract is ambiguous and in-

CORPORATIONS—COSTS.

CONTRACTS—Continued.

tentional doubtful, and even then it ought to appeal with reasonable certainty that acts alleged to have been performed in the construction of the contract were voluntary acts of both parties, performed with knowledge of the terms of the contract and in view of a purpose at least consistent with that to which they are sought to be applied. *Yowell v. Life Ins. Co.*, 70.

2. *Recovery. Burden of proof.*

To recover money paid though mistake of fact, burden is on plaintiff to show that payments were in fact made under a mistake of fact. *Ib.*

3. *Assent to offer may be either express or implied.*

Though an assent to an offer is requisite to the formation of a contract or agreement, such assent is a condition of mind, and may be either expressed or merely evidenced by circumstances. *Cole-McIntyre-Norfleet Co. v. Holloway*, 679.

CORPORATIONS.

1. *Purchasing own stock. Recovery.*

In the absence of statutory authority, a corporation cannot purchase its own stock, and if it attempts to do so it may recover the amount paid to the stockholder, or if it becomes insolvent its receiver or assignee may have such recovery. *Whaley v. King*, 1.

2. *Lease to corporate promoter. Provision releasing from liability. Evidence.*

Where a lease to corporate promoters provided that they were not to be personally liable for rent accruing after the thirty-sixth installment was paid, provided the corporation was organized and became lessee, and \$20,000 in cash was paid into its treasury, lessor's contention that such sum had not been paid in, held contrary to the evidence. *Joy v. Binswanger*, 568.

3. *Contracts between promoters and third persons. Payment for corporate stock. Furnishing machinery.*

Where a contract by promoters with third persons required the payment of a certain amount of cash into the treasury of a corporation being organized, payment for stock by purchase of machinery held sufficient, the formality paying the money for the machinery and repaying it into the treasury being useless. *Ib.*

COSTS.

Allowance. Parties entitled.

Where plaintiff was successful in the justice court, circuit court, and court of civil appeals, and the defendant in the supreme court

COUNTIES—COURTS.

COSTS—Continued.

secured reduction to the amount of liability admitted, held, that the defendant should pay the justice court costs, and the plaintiff the costs of appeal and of circuit court, although the question of legal tender by defendant was doubtful. *Southern Ry. Co. v. Williams*, 46.

COUNTIES.

See CLERKS OF COURTS.

Appropriation of funds. Damages for condemnation of land. County court. "May."

Acts 1907, chapter 323, providing that quarterly county court "may" appropriate out of the general funds of the county moneys for payments of any damages found to be due landowners, or others suffering from the action of the "Tipton county road commissioners in condemning land," means that county court "shall" make such appropriation. *Gamble v. Paine*, 548.

COURTS.

See CLERKS OF COURTS.

1. *Appellate jurisdiction. Tennessee.*

Where the principal purpose of a bill is a recovery of a money judgment in excess of \$1,000, an appeal will lie direct to the supreme court; but, if it have some other principal purpose, an appeal will lie only to the court of appeals, notwithstanding an incidental prayer for recovery of a money judgment in excess of \$1,000. *Hutchins v. Wilson*, 297.

2. *Appellate jurisdiction. Tennessee. Appeal from decree upon creditor's bill.*

The main purpose of a creditors' suit is not to obtain a money judgment, but to impound property, enjoin the proceedings in which property has been attached, and adjudicate the interests of all claimants as to their priority rights, and appoint a receiver for preservation of property, and the appellate jurisdiction thereof lies in the court of civil appeals. *Ib.*

3. *Jurisdiction. Tennessee. Statutes.*

Acts 1907, chapter 82, creating the court of civil appeals, confers upon it appellate jurisdiction in all civil cases from the law and equity courts, with certain named exceptions, and the supreme court cannot assert jurisdiction unless a particular case falls clearly within one of the exceptions enumerated. *Ib.*

CRIMINAL LAW.

COURTS—Continued

4. *Judgment. Jurisdiction by consent or waiver. Collateral attack.*
When the court has no jurisdiction of the subject matter, it cannot be conferred either by waiver or consent, and all of its orders and decrees are a nullity, and may be collaterally attacked. *In re Lumber & Mfg. Co.*, 325.
5. *Shippers' actions for damages. Action on award of interstate commerce commission. Jurisdiction of federal and state courts.*
Under Interstate Commerce Act, section 16 (U. S. Comp. St. section 8584), relating to awards of damages to shippers, when an award has been made by the Commission, but such order has not been complied with by the carrier, the shipper may institute suit either in the federal or state court. *Ib.*
6. *Actions for discrimination. Jurisdiction of state court.*
The State court has no jurisdiction of a suit by a shipper to recover damages for discrimination against a common carrier, based on a finding of the Interstate Commerce Commission reducing rates for freight shipments on the ground of discrimination; no award of damages having been made by the Commission. *Ib.*

CRIMINAL LAW.

See LIMITATION OF ACTIONS.

1. *Criminal statute. Construction.*
Construction of criminal statute which in many instances would defeat legislative purpose will not be adopted unless forced by express language. *State v. Cooley*, 33.
2. *Jurisdiction. United State property.*
Where land is ceded to or purchased by the United States with the consent of the State under Constitution U. S., article 1, section 8, subsection 17, the federal courts have jurisdiction of the prosecution for a crime committed thereon to the exclusion of the State courts. *Gill v. State*, 379.
3. *Jurisdiction. United States property. Constitutionality of statute.*
A State statute conferring jurisdiction on the State courts for the prosecution of a crime committed upon property ceded to or purchased by the United States government with the consent of the State under Constitution U. S., article 1, section 8, subsection 17, is unconstitutional and void. *Ib.*
4. *Jurisdiction. United States property. Compliance with statute.*
Where map of land purchased by United States had been taken to office of judge of county for purpose of closing road, and was not

CRIMINAL LAW.

CRIMINAL LAW—Continued

filed in county court clerk's office as required by Acts 1895, chapter 110, section 1, to show State's consent to acquisition of such property by the United States, jurisdiction of offense committed on such land remains in State courts; there having been no consent to purchase by United States, as required by Constitution U. S., article 1, section 8, subsection 17. *Ib.*

5. Appeal. Reversible error.

Acts 1911, chapter 32, prohibiting reversal unless error affecting result affirmatively appears, does not preclude reversal in a homicide case for separation of the jury, where proceedings at trial are not before the court, since statute applies only to cases where supreme court can consider merits of controversy. *Hickerson v. State*, 502.

6. Separation of jury. Waiver by failure to object.

In a homicide case accused did not waive his right to object to separation of the jury by failing to bring matter to court's attention during trial. *Ib.*

7. Reversal. Technical error.

Where evidence sustained conviction of voluntary manslaughter, court's action in orally charging that jury was not concerned with fixing punishment since punishment was fixed by law, in violation of Thompson's Shannon's Code, section 7186, requiring instructions to be in writing, was not reversible error, under section 6351a1, being mere technical error which did not affect judgment, and being correct statement of law under sections 4604, 4645, 7210a9, and 7210a10. *Munson v. State*, 522.

8. Written instructions. Felony cases.

The practice of orally charging juries in felony cases is not to be encouraged, and trial judges should in every case reduce their charges to writing. *Ib.*

9. Reversal. Technical error. Constitutional rights.

Notwithstanding Shannon's Code, section 6351a1, forbidding reversal except for error affecting the merits, there may be such violation or disregard of some constitutional right of the accused not affecting the merits that would induce the court to order a new trial. *Ib.*

10. Appeal. Harmless error. Validity of statute.

Acts 1911, chapter 32 (Shannon's Code, section 6351a1), forbidding reversal except for error affecting the merits, is valid. *Ib.*

CRIMINAL LAW.

CRIMINAL LAW—Continued.

11. *Indictment and information. Amendment. Nolle prosequi.*
Where indictment charging embezzlement incorrectly stated facts relating to the ownership of the property, the attorney-general should have recommitted the indictment and had it amended, and should not have filed a *nolle prosequi*. *State v. Costen*, 539.
12. "Nolle prosequi."
A "nolle prosequi," is a formal entry of record by the attorney general, by which he declares that he will no longer prosecute the case. *Ib.*
13. *Policy of statute.*
The court is not concerned with the policy of a statute. *Ib.*
14. *Review. Separation of jury. Burden of proof.*
A jury separation in a felony case, with possibility that a juror has been tampered with, renders verdict *prima-facie* void, and State has burden of making a satisfactory explanation. *Ib.*
15. *Bill of exceptions. Time for filing.*
Where bill of exceptions in a criminal case was not signed and filed within sixty days after trial term, but at a subsequent term in which a new trial motion was heard, that part of bill relating to new trial motion was seasonably preserved, but portion relating to proceedings at trial will be stricken. *Ib.*
16. *Separation of jury. Prejudicial effect.*
Where a juror in a homicide case was permitted to return home on account of illness and death of his child, the explanation of an officer who attended him that he did not think juror talked to any one except his wife, that he did not think anything improper occurred, etc., held insufficient to show that no prejudice resulted to accused. *Ib.*
17. *Court, in absence of defendant not charged with felony. Can enter plea of not guilty.*
Where a corporation, charged with failure to repair a turnpike owned and operated by it, was duly served with process and voluntarily entered appearance, by demurring and applying for continuance, but did not plead, the trial court, under Thompson-Shannon Code, section 7173, was authorized to enter plea of not guilty for it in its absence from the court; Construction, article 1, section 9, providing that accused hath the right to be heard by himself and his counsel, etc., applying only to charges of felony. *Lebanon & Big Spring Turnpike Co. v. State*, 675.

CUSTOMS AND USAGES—EASEMENTS.

CUSTOMS AND USAGES.

Course of certain dealers, not amounting to custom, insufficient to bind defendant.

In an action for failure to deliver meal purchased, the seller denying that it accepted the tentative contract made by its agent, the proof that some jobbers in the seller's city uniformly filled such orders, unless the buyer was notified to the contrary, not amounting to a custom, held valueless to make a case for plaintiff buyer. *Cole-McIntyre-Norfleet Co. v. Holloway*, 679.

DAMAGES.

Excessive damages. Personal injury.

Where a street car conductor was knocked from the running board of his car to the paved street by striking a negligently placed road roller, and so injured that he remained unconscious until after reaching hospital, where he remained seven days, and was unable to work for some days thereafter, but was paid wages by his employer for lost time, a judgment against the city for \$500 was not excessive. *City of Knoxville v. Arthur Lively*, 22.

DEEDS.

Exception. Reservation. Distinguished.

A clause that the conveyance is subject to a right of the grantors to remove sand from the land is not an exception with respect to part of the thing granted, but a reservation to the grantors; such right not formerly existing separately, but having been called into being by the deed. *Stanton v. Herbert & Sons*, 440.

See ADVERSE POSSESSION.

DRUGS.

"Dispense" or "distribute" morphine. Keeping duplicate prescription.

Defendant, a practicing physician and not a salesman of morphine, who prescribed morphine for an habitual user after personally attending the user, did not "dispense" or "distribute" the drug within Acts 1913 (1st Ex. Sess.) chapter 11, requiring physicians who "dispense" or "distribute" to keep duplicates of all prescriptions issued for a period of two years. *Friedman v. State*, 553.

EASEMENTS.

1. *Right of way. Permissive use.*

Where there was nothing to show that persons who used a path over a railroad right of way for about twenty-five years, or the

ELECTRICITY.

EASEMENTS—Continued.

public generally, did so under any claim of right adverse to the owners of the right of way, no prescriptive easement resulted. *C. N. O. & T. P. Ry. Co. v. Sharp*, 146.

2. *Ways. Over railroad right of way.*

Whether a railroad company acquired its right of way by condemnation or deed is no ground for distinction in determining whether a prescriptive way can be acquired over such right of way, for, regardless of the mode of acquisition, a railroad company, under Shannon's Code, section 2413, holds property only for railroad purposes. *Ib.*

3. *Prescriptive ways. Property in possession of lessee.*

Where a railroad company was in possession of a right of way as lessee, no prescriptive way over such right of way could be acquired, for the law will not presume a grant from the apparent acquiescence of one who could not have made it. *Ib.*

4. *Rights of way. Prescriptive easements.*

As a railroad holds its right of way for public purposes, a prescriptive way over such right of way cannot be acquired. *Ib.*

5. *Assignment. Right to take sand. Construction and operation.*

Where grantors assigned an assignable but indivisible right to take sand in the deed to three contractors building a large plant and using more sand than grantors would, such attempted division destroyed the reservation and gave the contractors no right to take sand. *Stanton v. Herbert & Sons*, 440.

6. *Reservations. Incorporeal hereditament.*

A reservation of the right to remove sand in a deed as "an easement, right or privilege," with rights necessary for such use, does not create an exclusive right passing an interest in land, corporeal, assignable, and divisible, but an incorporeal hereditament, assignable but not divisible. *Ib.*

ELECTRICITY.

1. *Use of false meter. Sufficiency of indictment.*

An indictment for using false meter in supplying town with electrical current in violation of Thompson's Shannon's Code, section 6734, which fails to state that such use was with intent to defraud, is insufficient; such intent being the gravamen of the offense. *Rugg v. State*, 362.

ELECTIONS.

ELECTRICITY—Continued.

2. *Tampering with meter. Criminal prosecution. Sufficiency of evidence.*

In a prosecution for tampering with or changing electric meters before they could be tested by assistant state sealer of weights and measures, in violation of Pub. Acts 1913 (1st Ex. Sess.), chapter 46, section 9, evidence of the assistant sealer and superintendent of weights and measures that the meters had been tampered with or changed by defendant before they could be tested, where such facts were not of his own knowledge, but merely from information, was sufficient to sustain conviction. *Ib.*

3. *Interference with testing of meter. Sufficiency of indictment.*

Indictment charging interference by defendant with the sealing and testing of electric meters by deputy and assistant state sealer of weights and measures, in violation of Pub. Acts 1913 (1st Ex. Sess.), chapter 49, section 9, held sufficient without stating the location of the meters alleged to have been changed or tampered with by defendant and the manner in which they had been changed or tampered with. *Ib.*

ELECTIONS.

1. *Woman suffrage. Validity.*

Acts 1919, chapter 139, authorizing women to vote at certain elections and requiring them to furnish evidence of payment of poll taxes in same manner as men, etc., does not discriminate against men upon ground that no poll tax is levied against women, since such difference is due, not to the suffrage act, but to Constitution, article 2, section 28, requiring males to pay poll taxes, and legislature's failure to pass a law taxing women. *Vertrees v. State Board of Elections*, 645.

2. *Woman suffrage. Validity.*

Whether Acts 1919, chapter 139, section 3, requires women voting at municipal elections to produce poll tax receipts need not be decided, since municipalities having poll tax requirements should apply them to women whenever the legislature levies a poll tax upon females. *Ib.*

3. *Woman suffrage. Validity. "Qualified voters." Municipal election. Voting credit.*

Notwithstanding Acts 1919, chapter 139, authorizing women to vote at municipal elections, Constitution, article 2, section 29, providing that a municipality's credit should not be given or loaned except after an election by "qualified voters," etc., precludes women from voting upon such propositions, since "qualified voters" means male voters. *Ib.*

ELECTIONS.

ELECTIONS—Continued.

4. *Woman suffrage. Validity.*

Acts 1919, chapter 139, authorizing women who have resided within county for preceding six months to vote at municipal elections, etc., does not repeal Nashville city charter (Private Acts 1919, chapter 22, section 5 requiring a six months' residence in city before voting; and suffrage statute is therefore not invalid upon ground that it discriminates by allowing women to vote after a shorter city residence than is required of men. *Vertrees v. State Board of Elections*, 645.

5. *Ballot boxes. Joint resolution of legislature. Effect.*

A joint resolution by the legislature purporting to empower election boards to provide separate ballot boxes for women, conferred no additional power on election officers, but may be considered as an expression of legislative advice and opinion that election officers already had necessary power to take such steps. *Ib.*

6. *Woman suffrage. Ballot boxes.*

Election officers have power to provide separate ballot boxes for women in order to prevent fraud, especially in view of the joint resolution of legislature recommending and directing such a course. *Ib.*

7. *Woman suffrage. Validity.*

Acts 1919, chapter 139, authorizing women to vote for certain officers, etc., is not void because affording opportunity for fraud, since separate ballot boxes may be provided for women, and thereby eliminate the danger that they will fraudulently vote for officials not entitled to be elected by their votes. *Ib.*

8. *Woman suffrage. Validity.*

Acts 1919, chapter 139, authorizing women to vote for presidential and vice presidential electors, is valid under Constitution, article 7, section 4, providing the election of all officers not otherwise provided for by the Constitution shall be made in such manner as legislature may direct. *Ib.*

9. *Method of designating candidate. Mandatory provision.*

Shannon's Code section 1248, as to voter designating candidate of his choice by a cross(X), is not mandatory in the sense that a voter who uses a different mark, such as a check mark, will be deprived of his vote even when the intention is clear and obvious in view of section 1255; the provision of the latter section that none but ballots provided in accordance with the article shall be counted having reference to ballots described in section 1233 et seq. and not the manner of marking ballots. *Menees v. Ewing*, 399.

EMINENT DOMAIN.

EMINENT DOMAIN.**1. Review. Matters not presented on motion for new trial.**

Assignment with reference to allowance of interest will be overruled, where the matter was not called to the attention of the trial court on motion for new trial. *Southern Ry. Co. v. Pouder*, 197.

2. Compensation. Improvements made by condemnor.

Where railway company constructed a freight depot on lot on assumption that it was entitled to possession, *held*, that defendant, who thereafter was adjudged the owner, would not, in condemnation proceedings by the railway, be entitled to recover for the improvements. *Ib.*

3. Review. Scope.

It is unnecessary for court on appeal to decide whether defendants are entitled to value of lot without improvements at the time of the condemnation proceedings, as distinguished from the value of the lot at the time of plaintiff's entry, no distinction having been taken by defendants between the present value of the lot without the improvements and the present value of the lot with the improvements. *Ib.*

4. Power of road commissioners. Condemnation of land. Relocation of road.

Acts 1907, chapter 323, empowering Tipton county road commissioners "to condemn lands for purpose of widening or straightening roads, or reducing or avoiding grades, hills or marshy places," and authorizing county court to appropriate county moneys out of general funds for payment of landowner's damages, *held* to confer upon commissioners' jurisdiction of county roads, with power to relocate roads, and by exercise of eminent domain condemn land for such purpose. *Gamble v. Paine*, 548.

5. Relocation of road. Necessity for relocation. Conclusiveness of county court's determination.

Under Acts 1907, chapter 323, the legislature has delegated to Tipton county road commissioners the question of the necessity for or advisability of taking land in county for road purposes, subject to supervision of quarterly county court, the action of county court being conclusive, in absence of a strong showing of fraud or oppression, and circuit court on appeal therefrom being concerned only with judicial questions, with no right to try matter *de novo*. *Ib.*

EQUITY—ESTOPPEL.

EQUITY.

1. *Demurrer. Sufficiency.*

A demurrer which challenges generally the legal conclusions of a bill bottomed on unconstitutionality of a statute is sufficient. *Ogilvie v. Hailey*, 392.

2. *Waiver of demurrers.*

Defendants' demurrer to the bills, relied on in their answers, not having been called up or disposed of at the hearing, must be treated as waived. *Patterson v. Tate*, 607.

3. *Cross-bill. Protection of cross-complaints by bond.*

In suit by sureties on the bond of an administrator of children killed by a railroad to enjoin sale of their property on execution to satisfy an order of the probate court requiring them to pay into court the amount of a settlement made by the administrator with the railroad, the chancellor properly dismissed the crossbill of the mother and brother of the children killed asking decree for the amount shown to be due the estate of the deceased children; the interests of the mother and brother being protected by the injunction bond executed by the sureties. *Ib.*

4. *Additional bond in case of injunction.*

In suit by the sureties of an administrator to enjoin sale of their property on execution to satisfy an order to pay into the probate court an amount for which the administrator had defaulted, where the original injunction bonds were not in proper form, but conditioned only to pay costs and damages, and were insufficient to cover the amount of the judgment and interest, the chancellor properly required the sureties to execute an additional injunction bond on the hearing of the cases, and before they had been disposed of. *Ib.*

ESTOPPEL.

1. *Inconsistency of conduct.*

While the law of judicial estoppel is ordinarily applied to one who has made an oath to a state of facts in a former judicial proceeding which in a later proceeding he undertakes to contradict, yet it is frequently applied, where no oath is involved, to one who undertakes to maintain inconsistent positions in a judicial proceeding. *Stearns Coal & Lumber Co. v. Jamestown R. Co.*, 203.

2. *Judicial estoppel.*

Where defendant railway company's charter and amended charter were on record in the county, when complainant impleaded it as

EVIDENCE.

ESTOPPEL—Continued.

duly organized corporation, complainant in a subsequent suit is estopped, whether the suits be regarded as separate or as one proceeding, from setting up that railway is not a duly organized corporation. *Ib.*

3. *Reliance on former conduct.*

Where in a former suit complainant recognized the right of defendant railway to take the right of way in question, and defendant, believing that it had the right of way, extending its lines in connection therewith, complainant will not be relieved of the position taken in the former in subsequent suit in ejectment. *Ib.*

4. *Admissions by counsel. Judicial estoppel.*

In suit for breach of promise and seduction, where defendant's counsel conceded to jury that plaintiff had a good reputation, and the case was tried on that theory, it was not reversible error for the court, on motion for new trial, to disregard testimony to the effect that others had enjoyed sexual favors from plaintiff prior to time of charge of seduction. *Heggie v. Hayes*, 219.

EVIDENCE.

1. *Presumption. Proof by defendant.*

The rule that defendant is required to introduce evidence which he has in his possession to rebut plaintiff's case, applies only when plaintiff's proof and the legal deduction therefrom make a *prima-facie* case against defendant. *Davis v. Auto Tire Co.*, 527.

2. *Matters occurring between husband and wife.*

Testimony of a husband and wife as to matters occurring between them by virtue of, or in consequence of, the marital relation, even when admitted without objection, is insufficient to set up a contract between them to the prejudice of the husband's creditors, unless corroborated. *Crane & Co. v. Hall*, 556.

3. *Presumptions.*

A deed of property to grantor's wife for a recited consideration of \$5, love, and affection, shortly after the foreclosure of a trust deed executed by grantor to secure a note, leaving a large balance still due, was presumptively fraudulent. *Ib.*

4. *Parol evidence. Admissibility.*

Ordinarily, parol evidence is admissible to contradict a written agreement. *McGannon v. Farrell*, 631.

EXECUTORS AND ADMINISTRATORS.

EVIDENCE—Continued.**5. Admissibility. Parol evidence.**

Parol evidence is admissible to establish an independent or collateral agreement not in conflict with a written contract, or where original contract was verbal and only a portion of it was reduced to writing. *McGannon v. Farrell*, 631.

6. Parol evidence. Restrictions.

A free and unrestricted grant by deed cannot be varied by parol evidence that grantee agreed to erect only certain kinds of buildings upon the land. *Ib.*

See WITNESSES.

EXECUTORS AND ADMINISTRATORS.**1. Liability of sureties. Statute.**

At common law and under Shannon's Code 1917, section 1095, where sureties sign the bond of an executor or administrator in its blank printed form before it has been filled in, they are estopped to deny their liability for money received on the faith of the bond. *Patterson v. Tate*, 607.

2. Payment of moneys into court. Notice to sureties.

Under Shannon's Code 1917, section 4043, the probate court was authorized to require an administrator to pay into the office of the clerk the balance found to be due the estates of his intestates, and on his failure, and the clerk's motion, was authorized to award execution against the administrator and his sureties for the amount of the balance without any notice of the motion to the sureties; such notice having been given the administrator. *Ib.*

3. Settlement for wrongful death as part of estate. Liability of sureties.

Fund received by administrator of children killed by a railroad in settlement of claims against the road for the wrongful killing of the children constituted part of their estates, and the sureties of the administrator could be held liable for the same under the bond. *Ib.*

4. Payment of legacies. Debts.

A general legacy of a certain amount of money is not to be paid until all debts are paid out of the personal estate, the latter being the primary fund or property for the payment of debts. *Ford v. Cottrell*, 169.

5. Payment of debts. Resort to realty.

Realty as to which testatrix died intestate could not be subjected to

FALSE PRETENSES—GARNISHMENT.

EXECUTORS AND ADMINISTRATORS—Continued.

payment of debts, where personality was sufficient for that purpose; a contrary intention not appearing from the will. *Ib.*

See WILLS.

FALSE PRETENSES.**1. Bad check law. *Gravamen of charge.***

Gravamen of charge that defendant violated Public Acts 1915, chapter 178, the bad check law, is not the issuance of a check, but is the obtaining, with fraudulent intent, of money, or other property, or credit, by means of a check. *State v. Cooley*, 33.

2. Bad check law. “*Of which he is the maker or drawer.*”

Defendant violated Public Acts 1915, chapter 178, the bad check law, though he signed check for which he obtained goods as president of grocery company; statutory phrase “of which he is the maker or drawer” merely limiting applications to persons obtaining money or property with fraudulent intent by check which they draw personally or in representative capacity. *Ib.*

GARNISHMENT.**1. Implied repeal. *Increase of population.***

Private Laws 1915, chapter 273, making garnishable wages of officials and employee of municipalities of not more than 44,000 population, admittedly applying to a certain city, was not, as to such city, abrogated by Private Laws 1917, chapter 97, extending the corporate limits to take in adjacent towns, the population of which, with that of the city, would exceed 44,000 according to 1910 census; such repeal being contrary to the apparent legislative intent. *City of Knoxville v. Yardley*, 14.

2. Validity. *Collateral attack.*

In a suit to recover wages, a judgment of garnishment, rendered in another State, may be collaterally attacked, if void. *Southern Ry. Co. v. Williams*, 46.

3. Property subject to. *Salary of railroad employee.*

The salary of an employee of a railroad corporation being operated by the United States government under Act. Cong. March 21, 1918 (U. S. Comp. St. 1918, section 3115½a-3115½p), is not subject to garnishment. *Dickens v. Bransford Realty Co.*, 387.

4. Municipalities. *Governmental Agencies.*

It is the settled policy of the state to hold immune from garnishment all municipalities and other governmental agencies. *Ib.*

HIGHWAYS.

HIGHWAYS.**1. "Public road."**

A "public road" is a way open to all the people, without distinction, for passage and repassage at their pleasure. *Sumner County v. Interurban*, 493.

2. Excessive use. Liability.

Transportation company, operating heavy motor trucks on public roads and bridges of a county, held not liable to the county or county court as for an excessive use of the roads, though the trucks were so heavy as to break down the roads to some extent, and constituted a greater load than the bridges were designed to bear. *Ib.*

3. Exclusion from use. Authority of court.

The county court has no power, without legislative authority, to exclude any member of the public from reasonable use of a public road. *Ib.*

4. Use by motor vehicles.

The motor vehicle being a common means of transportation, and its use on the public roads being authorized wherever the size and character of the vehicle is not restricted by the legislature, the fact that a transportation company has used motor trucks heavier than customary, to the damage of the public roads and bridges of the county, does not give the county court or any one else an action against it for such use. The county can neither restrain the use of the roads or bridges, nor collect damages on account of their reasonable use. *Ib.*

5. Right to use.

Every member of the public has the right to use the public roads in a reasonable manner for the promotion of his health and happiness; the use being restricted to a use with due care and in a reasonable manner. *Ib.*

6. Reasonable use. Motor trucks.

Unreasonable use of public roads of a county by a transportation company using motor trucks must have involved more than the mere weight of the trucks and their loads, and have related to the manner of use, either in the management of the vehicles, so as to carelessly operate them upon the roads, or reckless driving by the motorman. *Ib.*

7. Ownership of road by turnpike company. Conveyance to county.

Since a turnpike company never owned certain public roads, merely having had the right to erect gates over them and collect

HOMICIDE—HUSBAND AND WIFE.

HIGHWAYS—Continued.

tolls for travel on them by complying with certain conditions prescribed by law, its conveyance to the county added nothing to rights of the county and merely destroyed the rights of the company. *Ib.*

8. Power to control. Prescription. Conditions of use.

The legislature, as the constitutional representative of the public, has the power to levy reasonable conditions on members of the public for their use of the public roads; but the county court, without express authority, has not such power, cannot take such action as proprietor, and as a county court has no power to legislate, so that an attempt of the court to restrict the size of motor trucks of a company and the weight of their loads was void, being unauthorized by the legislature. *Ib.*

HOMICIDE.**1. Breach of duty.**

If one owes to another a plain particular and personal duty imposed by law or contract, an omission resulting in the death of the party to whom such duty was owing usually renders the delinquent party guilty of homicide; so, where an infant child died by reason of her father's failure to provide proper medical attention, the father is guilty of homicide. *State v. Barnes*, 469.

2. Failure to provide for child. Grade of offense.

As to whether a father, who suffered his child to die for want of proper medical attention, is guilty of murder or manslaughter, depends upon the circumstances; it being probable that, if the neglect was not malicious or willful, he would be guilty only of manslaughter. *Ib.*

HUSBAND AND WIFE.**1. Wife's separate property. Rents.**

Under the Emancipation Act of 1913, a wife has a right to rent out her lands and to collect the rents accruing therefrom. *Henderson Grocery Co. v. Johnson*, 127.

2. Married women. Wife's title to property.

Under the Emancipation Act of 1913, a husband had no interest in a lot owned by the wife at time of her marriage, and the entire title thereto remained in the wife and might be levied upon and sold by her creditor as her property. *Ib.*

HUSBAND AND WIFE.

HUSBAND AND WIFE—Continued.**3. Wife's separate property. Emancipation act.**

Under the Emancipation Act of 1913, fully relieving married women from all disabilities on account of coverture and giving them the same right to acquire, hold, and dispose of realty and personality as if unmarried, a married woman can hold no separate property as such, and all her property to which she has title is subject to her debts. *Henderson Grocery Co. v. Johnson*, 127.

4. Property rights. Modification of husband's estate. Statutes.

The husband's common-law estate *jure uxoris* has been so materially modified by legislative enactments that only a bare privilege is left to the husband to rent out his wife's land and to collect the rents for the benefit of the family in the capacity of governor of the family and not for himself individually. *Ib.*

5. Removal of disabilities of married woman. Application of statute.

Acts 1913, chapter 26, removing the disabilities of married women and giving them the right to bind themselves personally, to sue and to be sued, etc., does not apply only to property, real and personal, in the possession of such women. *Moffat v. Schenk*, 305.

6. Commission of crime by wife. Presumption of duress by husband. Rebuttal.

Common-law presumption that wife acted under duress of her husband in committing crime, except murder or treason, was weak, and might be rebutted by very slight circumstances. *Morton v. State*, 357.

7. Married Woman's Act. Emancipation.

Under the Married Woman's Act of 1913, married women are no longer under a disability of coverture, but are completely emancipated. *Ib.*

8. Commission of crime by wife. Duress of husband. Rebuttal of presumption.

Where husband and wife were arrested for bringing six or eight sacks of whiskey, containing twenty quarts each, into the State in an automobile, the facts were sufficient to rebut any presumption, if it existed, that wife was acting under husband's duress. *Ib.*

9. Commission of crime by wife. Duress of husband. Married Woman's Act.

In view of the Married Woman's Act of 1913, there is no longer any presumption that the wife in committing crime acts under the duress of the husband. *Ib.*

INDICTMENT AND INFORMATION.

HUSBAND AND WIFE—Continued.**10. *Criminal responsibility of wife.***

At common law, a married woman was not responsible for crimes committed in the presence of her husband, except murder and treason; but for crimes committed out of her husband's presence, she was as responsible as if single. *Ib.*

11. *Wife's separate estate. Property conveyed to wife.*

A warranty deed to a married daughter, and the heirs of her body, "to have and to hold . . . to the only proper use and behalf of her . . . and her heirs and assigns forever," did not create in her a separate estate, and she could not convey a half interest therein to her husband. *Montague v. Buchanan*, 432.

12. *Contracts and conveyances between husband and wife. Improvements on wife's estate.*

A husband cannot recover for improvements made on his wife's lots, not her separate property, pursuant to contract by which his wife conveyed to him a one-half interest in such lots; such contract being void, and therefore incapable of creating a lien in favor of the husband upon her land. *Ib.*

INDICTMENT AND INFORMATION.**1. *Charge against individual. Bad check law.***

Indictment for violation of Public Acts 1915, chapter 178, the bad check law, held against defendant as an individual, not as president of a grocery company. *State v. Cooley*, 33.

2. *Railroads. Conclusion. Obstructing public highway at crossing.*

Under the common law, a railroad can be indicted for obstructing a public crossing, but the indictment or presentment must conclude "to the common nuisance." *Southern Ry. Co. v. State*, 133.

3. *Proviso. Obstruction of public crossing by a railroad company.*

As Shannon's Code, section 6514 et seq. (Acts 1879, chapter 183), applies only to highways within limits of incorporated towns or cities where incorporating laws are repealed or charters forfeited, or the towns have failed to keep an organized board of mayor and aldermen, a presentment thereunder, which fails to show that the highway obstructed is within the act and not excluded by proviso, is sufficient. *Ib.*

4. *Misdemeanors. Description of offense.*

In indictment for misdemeanors, a substantial description of the offense is required to reasonably identify the offense for which the defendant is being prosecuted. *Rugg v. State*, 362.

INSANE PERSONS—INSURANCE.

INSANE PERSONS.*Right to appeal. Inquisition.*

A defendant, against whom there has been a judgment of lunacy in an inquisition held for that purpose, is entitled to appeal. *Harmon v. Harmon*, 64.

INSURANCE.*1. Payment of premiums. Presumptions.*

The presumption is that the insured has paid all premiums due when he exhibits a receipt for the last month's premium. *Conrad v. Interstate Life & Accident Ins. Co.*, 14.

2. Health and accident insurance. Extent of liability.

Under accident policy limiting liability to three weeks' benefit for disability from hernia, one receiving an accidental hernia was not limited to three weeks' recovery. *Ib.*

3. Contract of agency. Practical construction by parties.

Mere fact that general agent of insurance company continued to pay renewal commissions to a subagent, who had terminated his contract, did not show a practical construction to effect that subagent was entitled to renewal commissions; it not being shown when company first received notice of cancellation of contract. *Yowell v. Life Ins. Co.*, 70.

4. Contract of agency. Construction.

Where a representative of an insurance company draws up a contract of agency, the contract, in cases of doubt, will be construed most strongly against the company. *Ib.*

5. Agents. Construction of contract. Surrounding circumstances.

The chancellor in construing a contract between an insurance company and its agent should look to the relation of the parties, the object to be accomplished, and the general circumstances attending its execution, to determine whether the agent was entitled to renewal commissions after the termination of the contract. *Ib.*

6. Contract of Agency. Renewal commissions.

Under a contract between an insurance company and an agent, held, that the parties meant to confine renewal commissions under former contracts to the continuance of the present contract. *Ib.*

7. Accident insurance. Notice of injury. Knowledge of disability.

Where two accident insurance policies provided that "written notice of an injury or of the beginning of any disability" must be given within forty days, and "within twenty-one days from the date of

INTERSTATE COMMERCE.

INSURANCE—Continued.

the accident or injury," respectfully, an insured, who lost an eye by accident, but did not know the extent of the injury until forty-one days after the accident, complied with the terms of the policies, where he gave notice within forty and twenty-one days, respectively, from the time he acquired such knowledge. *Watkins v. U. S. Casualty Co.*, 583.

8. *Accident insurance. Construction of policies.*

Provisions in accident insurance policies relative to the time within which notice of loss or injury must be made must be construed according to the intention of the parties and against the insurer, where such construction does not violate the plain provisions of the contract. *Ib.*

9. *Accident insurance. Payment of premiums. Evidence.*

In an action on an accident insurance policy, a claim by the insurer that premiums had not been paid could not be sustained, where it appeared that the insurer's local agent had extended credit to insured, paid the premium for him, and charged it to him. *Ib.*

10. *Accident insurance. "Loss of entire sight."*

Under an accident insurance policy, there was "loss of the entire sight of one eye," where insured's eye became incurably sightless and useless, although a slight light perception still remained. *Ib.*

11. *Accident insurance. Notice of other insurance. Waiver.*

In an action on an accident insurance policy, where the defense was interposed that insurer was only liable for a proportionate part of the loss because of insured's failure to give it notice that other insurance had been taken out, such notice held waived by failure to cancel the policy and collection of premiums after knowledge of the other insurance. *Ib.*

INTERSTATE COMMERCE.

1. *Interstate commerce act. Remedies of shipper.*

Interstate Commerce Act, section 22 (U. S. Comp. St. section 8595), providing that nothing in the act shall abridge existing remedies, but that the provision of the act shall be in addition thereto, reserves to the shipper his remedies existing at common law or statute, in so far as they do not conflict with the provisions of the act, so that, where no administrative question is involved, and the shipper does not invoke the aid of the Interstate Commerce Commission, he may prosecute his common-law or statutory remedies. *In re Lumber & Mfg. Co.*, 325.

JUDGES—JUDGMENT.

INTERSTATE COMMERCE—Continued.

2. *Interstate commerce commission. Procedure. Remedies of shippers.*

Where a shipper applies to the Interstate Commerce Commission in regard to discrimination, he must proceed in accordance with the Interstate Commerce Act. *In re Lumber & Mfg. Co.*, 325.

3. *Actions for damages against carriers. Interstate commerce. Procedure.*

Interstate Commerce Act, section 9 (U. S. Comp. St. section 8573), allowing persons damaged by any common carrier to complain to the Interstate Commerce Commission, or to bring suit for damages in federal courts, provides two methods for the ascertainment of damages, which are exclusive, one to the commission, and the other to the federal courts. *Ib.*

JUDGES.

Duty of judge. Impartiality.

In a criminal prosecution, the judge does not represent the State in the prosecution of the criminal, but should judge fairly and impartially of the complaint of the State against the defendant and of the defense or defenses made thereto. *State v. Costen*, 539.

See COURTS.

JUDGMENT.

1. *Full faith and credit. Want of Jurisdiction.*

A judgment of a court of another state is not entitled to full faith and credit, under Constitution U. S. article 4, section 1, if void for lack of jurisdiction. *Southern Ry. Co. v. Williams*, 46.

2. *Parties. Conclusiveness. Waiver of defects.*

Where a bill against an unincorporated religious association named as defendants trustees who had gone out of office shortly before, but the association defended the suit employing counsel, held, that the judgment was binding against the association; the case being one of misnomer which was waived unless raised by plea in abatement. *Hunter v. Swadley*, 156.

3. *Conclusiveness. Person promoting defense.*

A prior grantee of a defendant in ejectment was not bound by the judgment, under Acts 1851-52, chapter 152 (Thompson's Shannon's Code, section 5000), although he was present and was allowed to control the defense as fully as if he and not his grantor had been the defendant. *Taylor v. Blackwell*, 184.

JURISDICTION—LIMITATION OF ACTIONS.

JURISDICTION.

Authority of United States over property purchased from State. Ownership of soil.

Where the United States purchases land without the consent of the State in which the land is situated, the mere ownership of the soil does not give the United States paramount authority over such land. *Gill v. State*, 379.

LICENSES.**1. Privilege tax. Discrimination.**

Priv. Acts 1915, chapter 407, assessing a privilege tax on automobiles used for pleasure, but not on automobiles used for business, is not unconstitutional as arbitrary and discriminatory. *Ogilvie v. Hailey*, 392.

2. "Privilege" Automobiles.

As was done in Priv. Acts 1915, chapter 407, the use of automobiles on highways for pleasure may be declared a "privilege." *Ib.*

3. Statutes. Purpose and disposal of taxes.

Priv. Acts 1915, chapter 407, assessing a privilege tax on automobiles used for pleasure, must be construed together with Priv. Acts 1917, chapter 441, creating a board of highway commissioners, etc., and hence is not open to the attack that it contains no provision for the expenditure of such taxes when collected. *Ib.*

LIMITATION OF ACTIONS.**1. Seduction. Breach of marriage promise. Accrual of right.**

Where all of the time the unlawful relation continued the parties were under a contract of marriage, the Statute of Limitations would not begin to run until the last act of seduction was had under the promise of marriage. *Heggie v. Hayes*, 219.

2. Seduction. Breach of marriage promise. Accrual of right.

Although contract of marriage was not entered into prior to the first unlawful act, if the contract existed thereafter concurrently with the illicit intercourse, such contract of marriage was sufficient to prevent the defendant from referring the Statute of Limitations to the first unlawful act. *Ib.*

3. Removal of disabilities of married women. Effect on saving clause of disability statute.

Acts 1913, chapter 26, removing disabilities of married women, did not repeal saving clause of Shannon's Code, section 4448, in favor of married women, as to commencement of actions after removal of their disability, and complainant married woman had the right

MASTER AND SERVANT—MORTGAGES.

LIMITATION OF ACTIONS—Continued.

to sue the adverse possessors of land, under the saving clause of section 4448, within three years after chapter 26 took effect, January 1, 1914, and, not having done so, the suit, not filed until May 24, 1917, is barred. *Moffat v. Schenck*, 305.

MASTER AND SERVANT.**1. Negligence of automobile driver. Liability of owner. Presumptions.**

In action against owner of automobile for negligence of driver, proof of ownership is not sufficient to raise presumption of law that driver was owner's servant, or that he was acting within the scope of his employment at time of accident. *Davis v. Auto Tire Co.*, 527.

2. Negligence of automobile driver. Liability of owner.

Liability of automobile owner for negligence of driver is based upon his legal control of the driver. *Ib.*

3. Injuries to servant. Actions. Declaration.

In action by administrator of deceased minor brought under the federal Employers' Liability Act for the death while obeying instructions in the operation of a freight train, declaration held sufficient in respect to allegations as to the existence of the relation of master and servant. *Roberts v. Southern Ry. Co.*, 95.

MECHANICS' LIENS.**Right to lien. Materials furnished to materialman. "Mechanic, founder, or machinist."**

Where owner ordered material from materialman, who in turn ordered it from another materialman, the latter materialman has no lien for the material so furnished and used in the construction of the building, having had no special contract with owner or his agent, under Shannon's Code, section 3531, in view of act of 1860, and being no "mechanic, founder, or machinist," within section 3540. *Portland Cement Co. v. Lumber & Box Co.*, 210.

MORTGAGES.**Priority. Right to.**

Where plaintiff was entitled to subject to the payment of his debt, incurred by the original church, funds which a second church received from the first, held that, where the second church did not complete its corporate organization until after complainant filed his bill, complainant was entitled to satisfaction out of its

MUNICIPAL CORPORATIONS.

MORTGAGES—Continued.

property prior to mortgages executed by the second church as a corporation, though such mortgages were valid as against the church; he having fixed a prior lien by attachment. *Hunter v. Swadley*, 156.

MUNICIPAL CORPORATIONS.**1. Streets. Obstructions. Personal injury. Evidence.**

Evidence, in an action by a street car conductor against a city for personal injuries resulting from negligent obstruction of street by a road roller, held sufficient to support a verdict for plaintiff. *City of Knoxville v. Arthur Lively*, 22.

2. Streets. Obstructions. Liability for personal injury.

Where the distance from curb to nearest street car rail was ten feet six inches, and a road roller six feet wide was unnecessarily placed three and one-half feet from curb to fill boiler with water, and the roller's fender was so close as to strike a conductor standing on the running board of his car, the city is liable for personal injury resulting therefrom. *Ib.*

3. Streets. Obstructions. Personal injury. Contributory negligence. Evidence.

Evidence held not to sustain defendant city's contention that plaintiff conductor, necessarily standing on the running board of his street car collecting fares, when struck and injured by a city's negligently placed road roller, was guilty of contributory negligence. *Ib.*

4. Trial. Streets. Obstructions. Personal injury. Contributory negligence. Instructions.

In action against city by a street car conductor, injured by being struck by a road roller left standing too close to passing street cars, an instruction on contributory negligence, in not seeing the roller, held properly refused, as confusing because containing too many different suppositions of cumulative facts. *Ib.*

5. Streets. Obstructions. Duty of a street car conductor.

A street car conductor, standing on the running board of his car collecting fares and discharging passengers, is not bound to keep a constant lookout to escape from a nuisance in the form of a dangerous street obstruction. *Ib.*

6. Negligence of servants. Liability. Performance of strictly governmental duties.

The rule that a city is not liable for its employees' negligence in handling tools and appliances in the performance of a strictly governmental duty does not relieve the city where such instru-

MUNICIPAL CORPORATIONS.

MUNICIPAL CORPORATIONS—Continued.

mentalities are so used as to constitute a temporary or permanent nuisance. *City of Knoxville v. Arthur Lively*, 22.

7. Powers. Delegation.

The powers possessed by municipal officers must be viewed as public trusts, and legislative powers of the board of mayor and aldermen cannot be delegated to the mayor, although mere ministerial powers may be so delegated. *Totspeich v. Morristown*, 113.

8. "Ministerial Act." "Legislative Act."

A purely ministerial function of a municipal officer is one as to which nothing is left to discretion, which legislative acts involve the exercise of discretion and judgment. *Ib.*

9. Delegation of powers. Legislative powers.

Where Acts 1903, chapter 103, under which a city was incorporated, vested in the board of mayor and aldermen all power to contract, an arbitration agreement made by the mayor with one whose property the city desired to condemn for a new city hall building was void, for, though the board of mayor and aldermen by resolution directed the mayor to enter into a written agreement of arbitration, and select arbitrators, held, that such acts involved discretion, and the power to perform the same could not be delegated. *Ib.*

10. Mayor. Eligibility. Registration as voter.

Thompson-Shannon's Code, sections 1012, 1014, relating to the registration of voters, as authorized by Constitution, article 4, section 1, do not prescribe qualifications of electors, but were enacted to regulate the exercise of the elective franchise, and registration is not necessary to make one a voter in a city so as to be eligible under its charter (Acts 1903, chapter 336, sections 6, 9, 19), to election as mayor. *Trammell v. Griffin*, 139.

11. Mayor. Eligibility. "Voter."

Under charter of City of Jellico embodied in Acts 1903, chapter 336, sections 6, 9, 13, declaring no one eligible to office of mayor unless he shall be a citizen of the state and city, and a voter in the city, and shall have resided in the city for six months next preceding the election, the term "voter" means one having the qualifications entitling him to vote, and not one who has registered as a voter. *Ib.*

12. Knowledge of legislature. Presumption.

In adopting a plan or scheme by which the city of Memphis should proceed in its local improvements, with attendant assessments for the benefits accruing, it is to be presumed that the legislature

MUNICIPAL CORPORATIONS.

MUNICIPAL CORPORATIONS—Continued.

was aware of those methods of special assessments constantly adopted and generally in operation throughout the States of the Union. *City of Memphis v. Hill*, 250.

13. Improvements. Assessments. Statutes. Strict construction.

The purpose of Acts 1907, chapter 341, as amended by Acts 1909, chapter 109, and Priv. Acts 1913, chapter 244, constituting the abutting property law for the city of Memphis being to provide for a species of taxation, its intendment must be strictly construed against the power and in favor of the citizen affected. *Ib.*

14. Assessments. Benefits. Nonabutting property.

That the property of respondent or other property adjacent to the improvement is benefited by the same, and in the same manner, and to the same extent, as property abutting immediately upon the improvement, affords no reason for a construction of Acts 1907, chapter 341, as amended by Acts 1909, chapter 109 (Private Acts 1913, chapter 244), which is not clearly comprehended by its terms. *Ib.*

15. Street improvements. Assessments. Front-foot rule.

Under Acts 1907, chapter 341, as amended by Acts 1909, chapter 109, and Private Acts 1913, chapter 244, the city of Memphis in levying special assessment is authorized to proceed solely against property abutting the street or part of the street to be improved, and assessments are to be made by the front-foot rule. *Ib.*

16. Street improvements. Assessment. Property subject.

Where an assessment in proportion to frontage is the mode prescribed by the legislature, property remote from the actual improvement and property not abutting upon the improvement is not subject to assessment. *Ib.*

17. Plaintiff cannot recover for death of his decedent contributorily negligent.

If plaintiff's decedent, killed in an automobile collision, was guilty of negligence proximately contributing to the accident, plaintiff cannot recover for the death unless otherwise provided by statute. *Bejach v. Colby*, 686.

18. Instruction as to contributory negligence in automobile accident misleading.

In an action for death of plaintiff's decedent in an automobile collision, an instruction that, if such decedent was guilty of gross contributory negligence, there could be no recovery, regardless of whether or not it was one of the proximate causes of the accident, held misleading. *Ib.*

NAVIGABLE WATERS—NEGLIGENCE.

NAVIGABLE WATERS.***Islands. Ownership. Taking sand. Damages.***

The owner of an island in a navigable river cannot recover for the value of sand wrongfully taken from land submerged by the construction of a government dam; such land being government property, taken by eminent domain, for which the government was liable in damages. *Stanton v. Herbert & Sons*, 440.

NEGLIGENCE.**1. *Unguarded elevator shaft. Liability of owner for injuries.***

Storage company, having adjoining building being constructed by contractor, owed concrete inspector, employed in the construction of adjoining building, no duty of keeping its wareroom in reasonably safe condition, though inspector frequently consulted with president of storage company, and occasionally transacted business with him in the office of the storage company, where he had never been invited into, and had no business to transact in, the wareroom. *Warehouse & Cold Storage Co. v. Anderson*, 288.

2. *Duty to invitee.*

Owner, who expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, has duty of being reasonably sure that he is not inviting them into danger, and to that end must exercise ordinary care and prudence to render the premises reasonably safe for the visit. *Id.*

3. *Theory of negligence.*

The theory of all negligence cases is that the defendant has violated some legal duty he owed plaintiff. *Id.*

4. *Duty to invitee. Condition of premises.*

Duty of owner to keep premises in reasonably safe condition for those impliedly invited thereon extends only to those parts of the premises where person invited is expected to go. *Id.*

5. *Any contributory negligence of plaintiff will bar recover.*

Any negligence on the part of plaintiff contributing directly to the injury will bar an action. *Bejach v. Colby*, 686.

6. *Remote contributory negligence constitutes mitigation, but no bar.*

Where negligence by plaintiff is remotely connected with the cause of injury, the question to be determined is whether defendant exercising ordinary care and skill might have avoided the injury, and, if so, plaintiff's remote negligence may not be set up in bar of the action, but will be considered only in mitigation. *Id.*

NUISANCE—PARDON.

NUISANCE.

See ANIMALS.

OFFICERS.**1. Removal. *Ouster Act.***

Proceedings against officer under the Ouster Act should never be brought unless there is a clear case of official dereliction, as such a drastic statute should be invoked only in plain cases, not for purposes of inquisition. *State ex rel. v. Bush*, 229.

2. Resignation. *Acceptance.*

An officer's resignation is not complete until accepted by competent authority. *Ib.*

3. Resignation. *Denial of right.*

Right of officer to resign will be denied, especially where resignation is hastily made to thwart litigation. *Ib.*

PARENT AND CHILD.**1. *Duty of parent.***

It is the legal duty of a father to provide proper care, treatment, and medical attention for his infant child. *State v. Barnes*, 469.

2. *Failure to provide for child. Offenses.*

Where a father failed to provide for his infant child under sixteen according to his means, but suffered the child to sicken and die without medical attention, he cannot be punished under Acts 1915, chapter 120, making it a misdemeanor for a father to willfully fail to provide for his child under sixteen, but providing that, upon complaint, the father shall be required to execute a bond to secure the child's support, etc., and in event of his failure to comply with the undertaking he may be imprisoned for misdemeanor, as a delinquent parent cannot be imprisoned as an original proposition under the statute, but only for repudiation or breach of the undertaking required by the statute. *Ib.*

PARDON.**1. *Conditions. Binding effect.***

Pardon having been issued upon express condition that defendant pay all costs of the case, defendant, who accepted the benefits of the pardon, must be held to have assumed payment of costs. *Battistelli v. State*, 565.

2. *After conviction.*

Pardon after verdict, but before motion for new trial was overruled, came "after conviction" within Const. article 3, section 6. *Ib.*

PARTNERSHIP—PLEADING.

PARTNERSHIP..**1. Process. Due process of law.**

A summons to a partnership, whose members are not resident within the state, served upon their local manager, in accordance with Thompson-Shannon Code, section 4542, is insufficient, where a merely personal judgment is sought against the parties. *Knox Bros. v. Wagner & Co.*, 348.

2. Agreement. Record insufficient to establish.

In an action on rent notes under a lease which had been assigned to a corporation organized by lessees, defended on the ground that the corporation had assumed liability and defendants were released under the lease terms, evidence held not to show that lessees had agreed upon a partnership. *Ivy v. Binswanger & Co.*, 568.

PERSONAL INJURIES.

See DAMAGES; CARRIERS; NEGLIGENCE.

PLEADING.**1. Cure by verdict.**

A misstatement of time in a declaration is cured by the verdict. *Heggie v. Hayes*, 219.

2. Variance.

In suit for seduction, that seduction was alleged to have occurred on October 1, 1915, whereas the proof tended to show that it occurred in September, 1912, will not support contention that there is no evidence to prove case laid in the declaration. *Ib.*

3. Variance.

In breach of promise suit, that declaration alleged a contract of marriage entered into October 1, 1915, and the proof showed a contract entered into in September, 1912, did not create a fatal variance; there being only one contract of marriage. *Ib.*

4. Demurrer to pleas in abatement.

On demurrer to pleas in abatement to the jurisdiction, the averments of such pleas must be taken as true. *Knox Bros. v. Wagner & Co.*, 348.

5. Fraud. Accord and satisfaction.

In action at law, where accord and satisfaction is pleaded, plaintiff may set up fraud in securing the accord. *Conrad v. Interstate Life & Accident Co.*, 14.

PUBLIC SERVICE COMMISSION—SALES.

PUBLIC SERVICE COMMISSION.

Qualification. Ownership of railroad securities.

The provision of Acts 1897, chapter 10, creating the Railroad Commission, that no person owning stocks or bonds of any railroad or transportation company shall serve as commissioner, must be deemed incorporated in Acts 1919, chapter 49, extending the powers of the commission to public utilities, as street railroads, for the two acts after amendment will be read as one. *City of Memphis v. Enloe*, 618.

RAILROADS.

See CARRIERS.

RELIGIOUS SOCIETIES.

1. *Unincorporated societies. Property. Indebtedness.*

Where an unincorporated religious association sold its property and delivered the proceeds to another religious society which invested the same in new property, *held*, that one having a claim against the association, while not entitled to enforce it against the property, might reach the proceeds of the property in the hands of the new society. *Hunter v. Swadley*, 156.

2. *Unincorporated religious association. Actions against.*

An unincorporated religious association should plead, and be impleaded through its trustees, although it is doubtless true that, where the interests of the trustees are adverse to the association, the association may be impleaded by naming its members. *Ib.*

3. *Incorporation. Essentials.*

Under General Incorporation Act of 1875 (Thompson's Shannon's Code, section 2026), declaring that, after the certificate of the Secretary of State and the *fac simile* of the great seal shall be registered in the register's office of the county wherein the principal office of the company is situated, the formation of the company as a body politic shall be complete, a religious society which attempted to incorporate is not a corporation until the certificate is recorded in the office of the register, and, until such recordation, is not a *de facto* corporation and may be treated as an unincorporated association by one who did not recognize its corporate character. *Ib.*

SALES.

1. *Retention of title. Necessity of writing. Statutes.*

A note stating consideration as "one Chalmers 6 Cyl. car," and "it is further agreed that the title of said — shall remain in seller,"

STATUTES.

SALES—Continued.

being insufficient to identify the property without resort to parol evidence, does not comply with Acts 1899, chapter 15, requiring sales contracts retaining title to be in writing. *Kenner & Co. v. Peters*, 55.

2. *Unreasonable delay in rejecting solicited order amounts to acceptance.*

Where order for meal was solicited by wholesaler's drummer, wholesaler's delay for sixty days after order was taken in notifying the customer that it had not confirmed or accepted the order as required, held to be unreasonable, and to effect an acceptance of the order. *Cole-McIntyre-Norfleet Co. v. Holloway*, 679.

3. *Unreasonable delay in rejecting solicited order amounts to acceptance.*

Although orders solicited by drummers for wholesaler are not binding until accepted by wholesaler, yet, if wholesaler wishes to reject such an order, he should, especially in case of orders for perishable articles and articles consumable in the use, notify the customer within a reasonable time that the order is not accepted, and if, with ample opportunity, he fails to do so, silence for an unreasonable length of time will amount to acceptance, if the customer is relying on him for the goods. *Id.*

STATUTES.

1. *Special laws. Discrimination. Counties.*

Pub. Acts 1915, chapter 74, creating a constabulary for the State, and providing that expenses and compensation of members shall be paid by county or counties wherein services are rendered, but that counties having a population of 190,000 and over, according to the federal census of 1910, are exempt from the act, is unconstitutional, since no county but Shelby comes, or ever will come, within exception. *State ex rel. v. Cummins*, 318.

2. *Construction. Interpretation by officials.*

While an interpretation of a statute long adopted by State officials will be highly favored by the court, it will not be followed if palpably wrong. *Mengel Box Co. v. Stevens*, 373.

3. *Title. Licenses. Motor vehicles.*

The caption of Priv. Acts 1915, chapter 407, entitled "an act to provide revenue by assessing a privilege tax," etc., "on automobiles and motorcycles used for pleasure," etc., conforms to the body of the act. *Ogilvie v. Hailey*, 392.

STATUTES.

STATUTES—Continued.**4. Partial Invalidity. Licenses.**

Even though the penalty provided in Priv. Acts 1915, chapter 407, section 2, for nonpayment of privilege tax on pleasure automobiles should be held to be excessive and unconstitutional; it would not vitiate the remainder of the act. *Ib.*

5. Title and subject-matter. Amendments. Officers' compensation.

Priv. Acts 1917, chapter 525, providing for the payment of salaries to fire and police departments of the city of Nashville, designated in its caption to amend the city charter, being an amendatory act, it is not unconstitutional, as violating Constitution, article 2, section 17, relating to title of statutes, since an amendment incorporating provisions germane to the original act sought to be amended need recite nothing further than a correct statement of title of the original act. *State ex rel. v. Nashville*, 405.

6. Reading of bills. Amendments.

Where Priv. Acts 1917, chapter 525, amending city charter of Nashville, in its original form had been passed three times in the Senate and sent to the House, where it was substituted for an identical bill, which had been twice read in the House, and then amended by unnecessary additions and read a third time and passed and sent to the Senate, where amendment was concurred in and bill approved by Governor, it was not a violation of Constitution, article 2, section 18, requiring three readings of a bill in each house. *Ib.*

7. Construction. Omission.

A pure *casus omissus* occurring in a statute can never be supplied or relieved against by the court under any rule or canon of construction or interpretation. *Hickman v. Wright*, 412.

8. Construction. Ambiguity.

If actual language and provisions of statute are plain and clear, and are devoid of contradiction, or any affirmative ambiguity, so that statute, as result of express provisions, is not reasonably susceptible of twofold meaning, there is no room for applying any other rules or canon of construction. *Ib.*

9. Special laws. Classification of officers. Compensation.

Acts 1917, chapter 47, classifying certain officers for purposes of compensation according to population of their respective counties, making the minimum of one class and the maximum of the succeeding class the same, violates Constitution article 11, section 8, as allowing one in a certain class to enjoy a greater benefit than others in the same class. *Ib.*

STATUTES.

STATUTES—Continued.

10. *Contemporaneous construction.*

Shannon's Code, section 3029 (Acts 1803, chapter 47, section 1), making it an offense for any merchant, artificer, tradesman, farmer, or other person to exercise any of the common avocations of life on Sunday, etc., having been construed by the legislature, the legal profession, and the public generally not to prohibit the playing of professional baseball on Sunday, will not be held to do so by the supreme court. *State v. Nashville Baseball Ass'n.*, 456.

11. *Prohibition of baseball. Statute.*

Shannon's Code, section 3029 (Acts 1803), chapter 47, section 1), making it an offense for any merchant, artificer, tradesman, farmer, or other person to exercise any of the common avocations of life on Sunday, etc., does not prohibit the playing of professional baseball on Sunday; the game not having been in existence when the statute was enacted. *Ib.*

12. *Prohibition of professional baseball. Statute.*

Shannon's Code, section 3031 (Acts 1803, chapter 47, section 2), subjecting to the same proceedings and penalty as those who work on the Sabbath any person who shall hunt, fish, or play at any game of sport on Sunday, does not prohibit the playing of professional baseball; the game not having been in existence when the statute was enacted. *Ib.*

13. *Title. Provisions germane to general subject. Registration of dogs. Disposition of fees.*

Priv. Laws 1917, chapter 648, entitled "An act to regulate the keeping of dogs by requiring them to be registered and to declare the running at large of unregistered dogs a public nuisance in certain counties of this State and to provide penalties for violations of this act," is not unconstitutional as being broader than its title, in that section 8 thereof, providing that balance of registration fees, if any, shall be credited to a "Dog and Stock" fund, is not germane to its general subject; the tax being but an incident to the object expressed. *Pouder v. State*, 481.

14. *Validity. Title. Railroad commission. Amending acts.*

Acts 1919, chapter 49, which amended Acts 1897, chapter 10, entitled an act to create a Railroad Commission, defining its powers and duties to prohibit extortion, etc., is not invalid under Constitution, article 2, section 17, which forbids any bill to become a law which embraces more than one subject and declares that all acts which repeal, revive, or amend former laws shall recite in their caption the substance of the law repealed or revived on the theory that

STREET RAILROADS—SURETYSHIP.

STATUTES—Continued.

the original act related solely to railroads and the amending act was extended so as to embrace other public utilities, as street railroads. *City of Memphis v. Enloe*, 618.

15. Repeal by implication. General and special laws.

A general law does not repeal a special law unless such a legislative intent clearly appears. *Cole-McIntyre-Norfleet Co. v. Holloway*, 679.

16. Title. Sufficiency. Woman suffrage act.

Constitution, article 2, section 17, requiring statutes to contain only one subject expressed in the title, is not violated by Acts 1919, Chapter 139, authorizing women to vote at certain elections. *Ib.*

STREET RAILROADS.

See CARRIERS.

STREETS.

See MUNICIPAL CORPORATIONS.

SURETYSHIP.**1. Rules of construction.**

While the contract of an individual or voluntary surety will be strictly construed, and doubts and technicalities resolved in surety's favor, contracts of companies acting as surety for compensation must be construed most strongly against the insurer and in favor of the indemnity. *Cambria Coal Co. v. Surety Co.*, 270.

2. Failure of principal to sign bond.

Where the principal or obligor is bound by law or collateral undertaking so that the rights of surety are not jeopardized, the failure to sign the bond renders the same only technically, and not substantially, defective, and does not release the surety. *Ib.*

3. Surety bonds. Signature of principal.

Where a surety bond neither expressly nor by implication obligates the employee to perform any act, duty, or undertaking same affixing his signature, and his name appears thereon only as employee and his application for bonds binds him to insure surety against all loss, the employee's failure to sign the bond does not release the surety. *Ib.*

TAXATION.

TAXATION.**1. Inheritance tax. Property subject.**

The only interest that nephews and niece had in estate before intestate's death was the possibility that they might outlive intestate, and assignment by them of rights in estate did not transmit and vested interest, and estate would be liable to collateral inheritance and succession tax under Acts 1893, chapter 174, and Acts 1893, chapter 89, section 1. *Tate v. Greenlee*, 103.

2. Inheritance tax. Collection. Jurisdiction.

Where a bill is filed in chancery to settle an estate, clerk of county court, under Acts 1893, chapter 174, section 22, can maintain petition in such suit to collect inheritance tax. *Ib.*

3. Mortgage tax. Exemption from *ad valorem* tax. Constitutionality.

Acts of 1917, chapter 70, imposing tax on mortgages and deeds of trust to be levied "in lieu of all other taxes," held unconstitutional, as exempting registered mortgages and deeds of trust from *ad valorem* taxation in violation of Constitution, article 2, section 28. *State ex rel. v. American Trust Co.*, 243.

4. Foreign corporations. Privilege tax.

Act 1909, chapter 504, requiring foreign corporations to pay a privilege tax measured by their capitalization, applied to corporations that had already entered the State; the substance of the privilege being doing of business in State. *Mengel Box Co. v. Stevens*, 373.

5. Collateral inheritance tax. Shares of brothers and sisters. Statutes.

Although Acts 1893, Chapter 174, section 1, providing for collateral inheritance tax, was not enforceable for a time against property passing to an intestate's brother or sister in view of the revenue law, Acts 1893, chapter 89, section 7, passed subsequently, which was held to repeal it by implication to the extent of its repugnance and the subsequent revenue acts, Acts 1895 (2d Sess.) chapter 4. Acts 1897, chapter 2, Acts 1899, chapter 432, section 1, Acts 1901, chapter 128, Acts 1903, chapter 257, Acts 1907, chapter 541, Acts 1909, chapter 479, Acts 1915, chapter 101, and Acts 1917, chapter 70, amending Acts 1915, chapter 101, and the language, "and acts amendatory thereof," in Acts 1901, chapter 128, which refers to live amendatory acts only, does not have the effect of reinstating Acts 1893, chapter 89, section 7, and shares of brothers and sisters are now subject to collateral inheritance tax. *State ex rel. v. Shepherd's Estate*, 474.

TENANCY IN COMMON—WEIGHTS AND MEASURES.

TAXATION—Continued.**6. Poll tax. Statute. Validity. Tax on women.**

Constitution article 2, section 28, making male citizens liable for poll taxes, etc., does not impliedly prohibit the legislature from imposing a poll tax on women. *Vertrees v. State Board of Elections*, 645.

7. Legislative power.

Right to tax is essential to the existence of government, and the legislative power in this respect can only be restricted by distinct and positive expressions in the Constitution. *Ib.*

See CONSTITUTIONAL LAW.

TENANCY IN COMMON.**Adverse possession.**

Where the possession of a tenant in common was open and notorious and he cultivated for the statutory period, removed practically all the merchantable timber, sold some fifteen tracts off of the land, deeds being recorded in the register's office, and never made nor was asked for an accounting, the possession was adverse, and the right of the other tenants was barred. *Taylor v. Blackwell*, 184.

TRIAL.**1. Instructions. Assumption as to facts.**

In passenger's action for injuries sustained in alighting from train, an instruction on duty of assistance, which assumed the fact in issue that place where passenger alighted was dangerous, was erroneous. *Nashville Ry. v. Newsome*, 8.

2. Instructions. Refusal to instruct. Instructions already given.

Requested charge, covered by instructions given, is properly refused. *City of Knoxville v. Arthur Lively*, 22.

WEIGHTS AND MEASURES.**Criminal prosecution. Sufficiency of indictment.**

Indictment for selling, offering, and exposing for sale a commodity by measure numerically less than the quantity represented, in violation of Pub. Acts 1913 (1st Ex. Sess.) chapter 35, not stating the names of the person or persons to whom the alleged sales or offers to sell were made, held insufficient. *Rugg v. State*, 362.

WILLS.

WILLS.**1. "Demonstrative Legacy." "Specific Legacy."**

Under will bequeathing to a sister the rents of a house and lot during her natural life, house and lot to be sold at sister's death and proceeds given to an orphan's home, the legacy to the home was not "demonstrative," but "specific." *Ford v. Cottrell*, 169.

2. Date of taking effect.

Will does not take effect until death of testator. *Ib.*

3. Sale of property. "Ademption." Specific legacy.

Since, under will bequeathing to a sister rents of a house and lot during her natural life, house and lot to be sold at sister's death and proceeds given to an orphan's home, a sale of the house and lot during testatrix's lifetime worked an "ademption" as to sister, it also worked an ademption as to the home; the legacy to the sister taking precedence and priority in time and right to that of the home. *Ib.*

4. Ademption. Effect.

There being an ademption of legacies by testatrix's sale of house and lot in her lifetime, the proceeds constitute a part of general personal estate, and should, along with other personality, be applied to payment of debts and general legacies under the terms of the will. *Ib.*

5. Property undevised. Right of sole heir.

Where will providing for payment of debts and for a number of general pecuniary legacies contained no residuary clause and made no mention of real estate in question, testator died intestate as to such realty and it descended to her sole heir at law. *Ib.*

6. Payment of general pecuniary legacies. Property subject.

Under will providing for payment of debts and personal expenses and of several general pecuniary legacies, held, that there was no intention plainly expressed and reasonably implied that legacies should be provided for otherwise than from personal estate, so that court erred in holding that realty as to which testatrix died intestate was subject to payment to such legacies. *Ib.*

7. Specific legacies. Rights of legatees. Subrogation.

Where specific legacies are consumed by payment of debts, legatees are entitled by way of subrogation to the rights of creditors to go upon the undevised real estate for reimbursement to the extent

WILLS.

WILLS—Continued.

that the personality specifically bequeathed was encroached upon or consumed. *Ib.*

8. *General Legacy. Payment from undivided realty.*

A general legacy of a certain amount of money cannot be paid out of proceeds from undivided real estate, unless there is an intention to do so expressly declared or clearly inferred from the language of the will. *Ib.*

9. *Devise on life estate with remainder to life tenant's children.*

A codicil, considered with the will, held to devise a life estate only, with the remainder to life tenant's children. *Dodson v. Polk*, 695.

10. *Decree construing will not contradicted by decree vesting devisee with fee to land.*

A decree, passed for construction of a will, and ordering an allotment of testator's lands, and correctly adjudging that D took only a life estate, with remainder to his children, and a subsequent decree after allotment by commissioners of land to D, that all right of all the devisees and heirs of testator, except D, in and to the land assigned by commissioners to D, be divested out of them and vested in D, "his heirs and assigns forever," held not to vest D with the fee, the latter decree being consistent with former. *Ib.*

11. *Disposition of proceeds of life policy.*

The proceeds of life policy payable to testator's estate did not pass under his will giving all his estate, both real and personal, to his wife to have and hold in her own right, but insured to the benefit of widow and only child of testator by former marriage as provided by Shannon's Code, sections 4030, 4231. *Chrisman v. Chrisman*, 422.

12. *Disposition of proceeds of life policy.*

To effectuate the clear intendment of Shannon's Code, sections 4030, 4231, and create the exemption in favor of widow and children, the proceeds of insurance must take a different course from that of disposition by will, for so long as the same are incorporated in the assets of a deceased husband they remain liable to his debts and subject to the claims of creditors under section 3985. *Ib.*

13. *Disposition of proceeds of life policy. Intent.*

Testator is presumed to have known the effect of Shannon's Code, sections 4030, 4231, relative to disposition of his life insurance, and, in the absence of his express intent to the contrary, the statutory provisions are effective, though it was wholly within his power to prevent application of the sections. *Ib.*

See EXECUTORS AND ADMINISTRATORS.

WITNESSES.

WITNESSES.**1. Matters occurring in consequence of marital relation.**

In an action on a note and to set aside a transfer by defendant to his wife as fraudulent, evidence by defendant and his wife that the consideration in the deed was recited as being nominal merely by error of the draftsman, and that defendant was largely indebted to his wife, was properly excluded as a matter occurring between husband and wife, by virtue of or in consequence of the marital relation, under Thompson's Shannon's Code, section 5596. *Crane & Co. v. Hall*, 556.

2. Competency. Husband and wife. Statute.

Married Woman's Emancipation Act of 1913 does not change the rule of evidence that matters occurring between husband and wife in consequence of the marriage relation are inadmissible as against the husband's creditors. *Ib.*

3. Competency. Husband and wife. Statutes.

Acts 1915, chapter 161, making a husband and wife competent witnesses for or against other, relates only to criminal cases, and even in such cases they may not testify as to their dealings had apart from others. *Ib.*

See EVIDENCE.

... 25





